GT GreenbergTraurig

Mitchell F. Brecher
(202) 331-3152
BrecherM@gtlaw.com

May 17, 2010

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 09-197
CC Docket No. 96-45
In the Matter of Federal State Joint Board on Universal Service
TracFone Wireless, Inc.

Dear Ms. Dortch

On May 17, 2010, Richard B. Salzman, Executive Vice President and General Counsel, TracFone Wireless, Inc., and I met with Irene Flannery, Associate Chief, Wireline Competition Bureau, Alex Minard, Legal Advisor to the Chief, Wireline Competition Bureau, Jennifer McKee, Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, Vickie Robinson, Assistant Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, and with Elizabeth McCarthy and Divya Shenoy, both attorneys with the Telecommunications Access Policy Division, Wireline Competition Bureau.

During the meeting, we discussed certain allegations which have been raised in the above-captioned proceedings regarding the applicability of state laws governing fees to support emergency calling services (9-1-1 fees) to prepaid wireless services and whether TracFone is in compliance with such laws. We also discussed the status of efforts to enact legislation governing 9-1-1 fees in various states. We provided each attendee with a PowerPoint presentation which describes such laws an with several documents which describe such laws as well as commercial wireless industry efforts to have enacted 9-1-1 fees laws which contain workable methods for collection of 9-1-1 fees on prepaid services. A copy of that presentation and the documents provided is included with this letter.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically. If there are questions, please communicate directly with undersigned counsel for TracFone.

Sincerely,

Mitchell F. Brecher

enclosures

cc: Ms. Irene Flannery
M. Alex Minard
Ms. Jennifer McKee
Ms. Vickie Robinson
Ms. Elizabeth McCarthy
Ms. Divya Shenoy

Presentation

Collection of E911 Fees & Taxes

from

Customers of Prepaid Wireless Services

May 2010

1st Generation E911 Fee Statutes

- E911 taxes and fees in the states have traditionally been imposed by statute on wireless and local telephone end-users as separately stated surcharges on monthly bills.
- Many states, as well as wireless carriers, believe that the "1st Gen" laws do not apply to "pay-as-you-go" prepaid wireless customers who make most of their purchases in retail stores.
- Examples are:
  - Nebraska PSC opinion on prepaid 911 – 2005
  - Michigan Court of Appeals decision on prepaid – 2008
  - Texas district court decision on prepaid – 2010
  - Florida AG prepaid opinion - 2006
  - CTIA filing at FCC regarding Colorado 911 law - 2010
  - NJ & NY revenue dept. guidelines on prepaid
  - CTIA amicus brief filed in federal court in Kentucky - 2010

2nd Generation E911 Fee Statutes

- Beginning in 2002, states began to modify their E911 fee statutes to cover prepaid, recognizing that fees required to be collected on monthly bills were unworkable for prepaid wireless.
- Many “2nd Gen” statutes were modeled on the “Tennessee Method”, first adopted in that state in 2003. This method provided that:
  - The CMRS provider shall collect, on a monthly basis, the service charge from each active prepaid customer whose account balance is equal to or greater than the amount of the service charge; or
  - The CMRS provider shall divide the total earned prepaid wireless telephone revenue received by the CMRS provider within the monthly 911 reporting period by fifty dollars ($50), and multiply the quotient by the service charge amount.”
- The “TN Method” proved to be unfair and ineffective in state after state and was repealed by the legislatures in TN, ME, OK & VA in 2010.

3rd Generation
E911 Fee Statutes

- CTIA has been a successful advocate of fair and effective "3rd Gen" prepaid 911 fee statutes, which provide for collection at the retail point-of-sale (POS)". CTIA has said:
  - "The only effective and equitable solution to assessing E911 taxes/fees on prepaid wireless consumers is at the time the financial transaction takes place, which is when the service is sold."
- The National Conference of State Legislatures has endorsed POS and recommended a model POS bill to its membership.
- 12 states have already enacted POS, including 7 states in just the last two months. POS bills are pending in several other states. Other states will consider POS in 2011.
- The "3rd Gen" laws are equitable, nondiscriminatory, competitively neutral, and substantially strengthen state E911 funding and public safety.

Documents

Model Legislation

As approved by the NCSL Executive Committee Task Force
on State & Local Taxation of Communications and Electronic Commerce

As Amended January 29, 2010 (new language underlined; ~~deleted strikethrough~~)

An act imposing a uniform, statewide E911 charge[1] on the retail sale of prepaid wireless telecommunication services to consumers, precluding the application of other state and local E911 charges to such services, and making conforming changes.

SECTION 1. SHORT TITLE.

This Act may be cited as the Prepaid Wireless E911 Charge Act of 20___.

SECTION 2. FINDINGS. The Legislature finds that –

A. Maintaining effective and efficient 911 systems across the state benefits all citizens;

B. 911 fees imposed upon the consumers of telecommunication services that have the ability to dial 911 are an important funding mechanism to assist state and local governments with the deployment of enhanced 911 services to the citizens of this state;

C. Prepaid wireless telecommunication services are an important segment of the telecommunications industry and have proven particularly attractive to low-income, low-volume consumers;

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[1] Depending on state law, "fee" or "tax" may be a more appropriate label than "charge."

D. Unlike traditional telecommunication services, prepaid wireless telecommunications services are not sold or used pursuant to term contracts or subscriptions, and monthly bills are not sent to consumers by prepaid wireless telecommunication service providers or retail vendors;

E. Prepaid wireless consumers have the same access to emergency 911 services from their wireless devices as wireless consumers on term contracts, and prepaid wireless consumers benefit from the ability to access the 911 system by dialing 911;

F. Consumers purchase prepaid wireless telecommunication services at a wide variety of general retail locations and other distribution channels, not just through service providers;

G. Such purchases are made on a "cash-and-carry" or "pay-as-you-go" basis from retailers; and

H. To ensure equitable contributions to the funding of 911 systems from consumers of prepaid wireless telecommunication services, the collection and payment obligation of charges to support E911 should be imposed upon the consumer's retail purchase of the prepaid wireless telecommunication service and should be in the form of a single, statewide charge that is collected once at the time of purchase directly from the consumer, remitted to the state, and distributed to E911 authorities pursuant to state law.

SECTION 3. DEFINITIONS. For purposes of this Act, the following terms shall have the following meanings:

"Consumer" means a person who purchases prepaid wireless telecommunications service in a retail transaction.

"Department" means the [Department of Revenue].[2]

"Prepaid wireless E911 charge" means the charge that is required to be collected by a seller from a consumer in the amount established under Section 4 of this Act.

"Prepaid wireless telecommunications service" means a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid for in advance and is sold in predetermined units or dollars of which the number declines with use in a known amount.[3]

"Provider" means a person that provides prepaid wireless telecommunications service pursuant to a license issued by the Federal Communications Commission.

"Retail transaction" means the purchase of prepaid wireless telecommunications service from a seller for any purpose other than resale.

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[2] The proper agency will vary from state to state, but should be the agency that administers whatever tax (e.g., sales tax) provides the registration, resale-exemption, audit, and appeal procedures that are incorporated by reference in this Act.

[3] Alternatively, define by cross reference to sales tax statute. For example, if state has adopted SSUTA, substitute the following:

> "Prepaid wireless telecommunications service" means prepaid wireless calling service as defined in [SECTION IMPLEMENTING SSUTA DEFINITION].

"Seller" means a person who sells prepaid wireless telecommunications service to another person.

"Wireless telecommunications service" means commercial mobile radio service as defined by section 20.3 of title 47 of the Code of Federal Regulations, as amended.[4]

SECTION 4. COLLECTION AND REMITTANCE OF E911 CHARGE.

A. AMOUNT OF CHARGE. The prepaid wireless E911 charge shall be [____*per retail transaction*] [____*% of the sales price per retail transaction*][5] or, on and after the effective date of an adjusted amount per retail transaction that is established under paragraph F of this Section 4, such adjusted amount.

B. COLLECTION OF CHARGE. The prepaid wireless E911 charge shall be collected by the seller from the consumer with respect to each retail transaction occurring in this state. The amount of the prepaid wireless E911 charge shall be either separately stated on an invoice,

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[4] Alternatively, define by cross reference to sales tax statute. For example, if state has adopted SSUTA, substitute the following:

> "Wireless telecommunications service" means mobile wireless service as defined in [SECTION IMPLEMENTING SSUTA DEFINITION].

[5] States may choose to impose either a flat fee per retail transaction or a percentage of each transaction. The fee should be set at an amount that is not more than one-half of the state's monthly postpaid E911 charge.

receipt, or other similar document that is provided to the consumer by the seller, or otherwise disclosed to the consumer.

C. APPLICATION OF CHARGE. For purposes of paragraph B of this Section 4, a retail transaction that is effected in person by a consumer at a business location of the seller shall be treated as occurring in this state if that business location is in this state, and any other retail transaction shall be treated as occurring in this state if the retail transaction is treated as occurring in this state for purposes of [STATE LAW REFERENCE].[6]

D. LIABILITY FOR CHARGE. The prepaid wireless E911 charge is the liability of the consumer and not of the seller or of any provider, except that the seller shall be liable to remit all prepaid wireless E911 charges that the seller collects from consumers as provided in Section 5 of this Act, including all such charges that the seller is deemed to collect where the amount of the charge has not been separately stated on an invoice, receipt, or other similar document provided to the consumer by the seller.

E. EXCLUSION OF E911 CHARGE FROM BASE OF OTHER TAXES AND FEES. The amount of the prepaid wireless E911 charge that is collected by a seller from a consumer, if ~~whether or not~~ such amount is separately stated on an invoice, receipt, or other similar document provided to the consumer by the seller, shall not be included in the base for measuring any tax, fee, surcharge, or other charge that is imposed by this state, any political subdivision of this state, or any intergovernmental agency.

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[6] Cross reference to the state transaction tax that provides sourcing rules to be piggybacked here.

F. RE-SETTING OF CHARGE. The prepaid wireless E911 charge shall be proportionately increased or reduced, as applicable, upon any change to [the state E911 charge on postpaid wireless telecommunications service under [STATE LAW REFERENCE]].[7] Such increase or reduction shall be effective on the effective date of the change to the postpaid charge or, if later, the first day of the first calendar month to occur at least 60 days after the [enactment][8] of the change to the postpaid charge. The Department shall provide not less than 30 days of advance notice of such increase or reduction on the Department's website.

G. BUNDLED TRANSACTIONS.[9] When prepaid wireless telecommunications service is sold with one or more other products or services for a single, non-itemized price, then the percentage specified in Section 4 (A) shall apply to the entire non-itemized price unless the seller elects to apply such percentage to:

1. if the amount of the prepaid wireless telecommunications service is disclosed to the consumer as a dollar amount, such dollar amount; or

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[7] Will need to be adjusted depending on whether a state-level postpaid E911 charge applies.

[8] The term "implementation" may be substituted if the postpaid charge can change without enactment of a new law or an amendment to existing law.

[9] Subsection G is only required if a state elects to impose a percentage-based 911 fee in subsection A of Section 4.

2. if the seller can identify the portion of the price that is attributable to the prepaid wireless telecommunications service by reasonable and verifiable standards from its books and records that are kept in the regular course of business for other purposes including, but not limited to, non-tax purposes, such portion.

However, if a minimal amount of prepaid wireless telecommunications service is sold with a prepaid wireless device for a single, non-itemized price, then the seller may elect not to apply the percentage specified in subparagraph a. to such transaction. For purposes of this paragraph, an amount of service denominated as ten (10) minutes or less, or five dollars ($5) or less, is minimal.

SECTION 5. ADMINISTRATION OF E911 CHARGE.

A. TIME AND MANNER OF PAYMENT. Prepaid wireless E911 charges collected by sellers shall be remitted to the Department at the times and in the manner provided by [SALES TAX LAW][10] with respect to [SALES TAX]. The Department shall establish registration and payment procedures that substantially coincide with the registration and payment procedures that apply to [SALES TAX].

B. SELLER ADMINISTRATIVE DEDUCTION. A seller shall be permitted to deduct and retain three percent (3%) of prepaid wireless E911 charges that are collected by the seller from consumers.

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[10] Reference should be to a transfer tax of general application (e.g., sales tax or excise tax) and not to a communications-specific tax.

C. AUDIT AND APPEAL PROCEDURES. The audit and appeal procedures applicable to [SALES TAX] under the [SALES TAX LAW] shall apply to prepaid wireless E911 charges.

D. EXEMPTION DOCUMENTATION. The Department shall establish procedures by which a seller of prepaid wireless telecommunications service may document that a sale is not a retail transaction, which procedures shall substantially coincide with the procedures for documenting sale for resale transactions for [SALES TAX] purposes under the [SALES TAX LAW].

E. DISPOSITION OF REMITTED CHARGES. The Department shall pay all remitted prepaid wireless E911 charges over to [911 AGENCY][11] within [30] days of receipt, for use by [911 AGENCY] in accordance with the purposes permitted by [911 AGENCY LAW], after deducting an amount, not to exceed two percent (2%) of collected charges, that shall be retained by the Department to reimburse its direct costs of administering the collection and remittance of prepaid wireless E911 charges.

SECTION 6. NO LIABILITY.

A. NO LIABILITY REGARDING 911 SERVICE. No provider or seller of prepaid wireless telecommunications service shall be liable for damages to any person resulting from or incurred in connection with the provision of, or failure to provide, 911 or E911 service, or for identifying, or failing to identify, the telephone number, address, location, or name associated with any person or device that is accessing or attempting to access 911 or E911 service.

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[11] Intention is to piggyback on existing state-level E911 framework, if any.

B. NO LIABILITY REGARDING COOPERATION WITH LAW ENFORCEMENT. No provider or seller of prepaid wireless telecommunications service shall be liable for damages to any person resulting from or incurred in connection with the provision of any lawful assistance to any investigative or law enforcement officer of the United States, this or any other state, or any political subdivision of this or any other state, in connection with any lawful investigation or other law enforcement activity by such law enforcement officer.

C. INCORPORATION OF POSTPAID 911 LIABILITY PROTECTION. In addition to the protection from liability provided by paragraphs A and B of this Section 6, each provider and seller shall be entitled to the further protection from liability, if any, that is provided to providers and sellers of wireless telecommunications service that is not prepaid wireless telecommunications service pursuant to [CITE APPLICABLE STATE LAW EXCULPATORY PROVISIONS APPLICABLE TO POSTPAID WIRELESS SERVICE].

SECTION 7. EXCLUSIVITY OF PREPAID WIRELESS E911 CHARGE.

The prepaid wireless E911 charge imposed by this Act shall be the only E911 funding obligation imposed with respect to prepaid wireless telecommunications service in this state, and no tax, fee, surcharge, or other charge shall be imposed by this state, any political subdivision of this state, or any intergovernmental agency, for E911 funding purposes, upon any provider, seller, or consumer with respect to the sale, purchase, use, or provision of prepaid wireless telecommunications service.

SECTION 8. EFFECTIVE DATE.

This Act shall be effective with respect to retail transactions occurring on and after [_____].

Wireless Principles for 9-1-1 Fees and Surcharges

The goal of the wireless industry is to work with state policymakers and public safety officials to ensure that E911 service is a coordinated and collaborative operation between the private and public sector to provide quality E911 service at a reasonable cost. Wireless consumers provide significant capital to support public safety, through their payment of taxes, fees and surcharges. This funding is extremely critical to our nation's public safety systems, making it possible to obtain the necessary infrastructure to receive and act on wireless calls to emergency responders. These wireless calls help to save lives, locate missing children and prevent numerous crimes.

Wireless carriers annually collect nearly $2 billion dollars of dedicated taxes, fees and surcharges from wireless consumers for the purpose of supporting and upgrading the technical capabilities of the 6,174 Public Safety Answering Points (PSAPs) that exist across the country. In addition to the nearly $2 billion dollars annually collected from consumers and remitted to state and local governments, wireless service providers have also expended billions to modify their networks to enable them to identify and locate wireless 911 callers.

The taxes and fees collected from wireless consumers at the state and local level under the auspices of E911 deployment were collected to advance these stated public policy goals and must be solely dedicated to the advancement of E911. To that end, the wireless industry endorses the following principles concerning revenue collection and disbursement relative to E911 statutes in the states:

1. **Funds Should be Spent on E911 Systems**
2. **Need for Accountability and Audits**
3. **Justify Costs or Reduce Imposition**
4. **Funds Should Not be Raided or Diverted**
5. **Fees Should be Imposed on End-User**
6. **Collection at the State Level, Not Locality by Locality**
7. **Funding Should Ultimately be from General Revenue**

1400 16th Street, NW Suite 600 Washington, DC 20036 Main 202.785.0081 Fax 202.785.0721 www.ctia.org

Funds Should be Spent on E911 systems

The intent of E911 fees is to specifically support the costs to establish and maintain the emergency communications systems so that PSAPs have the ability to call back wireless 911 callers and pinpoint their location within FCC prescribed guidelines. Unfortunately, many policymakers incorrectly believe that E911 fees should be used for all sorts of basic public safety services. An emerging trend in multiple states is to ignore the intended purpose of E911 fees and instead use government imposed 911 fees to support general government services. These services that benefit all constituents are important. However, government services that are not directly related to establishing and maintaining emergency communications systems should be funded through general revenue funds that are raised by broad-based taxes and not through E911 fees imposed on users of communications services.

Need for Accountability and Audits

E911 operations and expenditures should not only be efficient, but also transparent and accountable to an oversight board and to the public through annual reports to the legislature and/or Governor. Annual reports should contain information regarding collections and expenditures and progress toward the goal of statewide deployment.

Justify Costs or Reduce Imposition

E911 services must be periodically reviewed and E911 fees shall be adjusted based on actual direct costs of achieving statewide deployment of wireless E911 service. As with any system implementation, funding requirements should decrease as soon as states become Phase I and Phase II compliant. Accordingly, E911 fees should be eliminated or substantially reduced once Phase I and Phase II compliance is achieved. The funding for the recurring costs of operating the system and providing emergency services to the general public should be provided from general revenue funds that are raised by broad-based taxes and not through E911 fees.

Funds Should not be Raided or Diverted

The capital provided in good faith by wireless consumers through 911 fees or surcharges has been and continues to be extremely critical in supporting public safety in a given state. However, the taxes and fees collected from wireless consumers at the state and local level under the auspices of E911 deployment need to be solely dedicated to the advancement of E911 deployment and not used for other revenue purposes.

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Fees Should be Imposed on End-user

Wireless E911 fees were established to be imposed on the end user (the beneficiary of being able to access the 911 system) and should not be imposed on or set up in a manner that results in the fee being imposed on the communication service provider. As in the case of all other wireless services, the E911 fee on prepaid wireless service should be collected on the purchase of the service. However, unlike other wireless service, prepaid wireless services are not billed on a monthly basis and are often sold through retail channels that are not exclusive to wireless carriers. Therefore, in order to help ensure ongoing end user support of E911 funding by wireless prepaid customers, the wireless industry maintains that it will be necessary to collect the E911 fee on all retail sales of wireless prepaid airtime whether sold by retail merchants or wireless service providers. This could be done in an efficient and transparent method by having all retailers collect the E911 fee as percentage based equivalent of the fee on each prepaid wireless transaction.

Collection at State level, not Locality by Locality

Wireless E911 fees should be established and collected on a statewide basis, with a single centralized collection agent and a single statewide E911 fee rate. Collection of a single, statewide fee reduces administrative burdens imposed upon communication service providers related to sourcing E911 fees to the proper local jurisdictions. Collecting fees at different rates which can change with little notice, and remitting multiple tax returns to local jurisdictions is onerous and time consuming. The centralized collection agent would then be properly positioned to determine a fair and equitable distribution to local jurisdictions. In those states where the wireless E911 fee is now locally administered, every effort should be made to transition toward an efficient statewide system as quickly as possible.

Funding Should Ultimately be from General Revenue

Sound tax policy supports the principle that government costs related to providing a common public service, such as E911 service, should be funded from general revenue. E911 services benefit all Americans and in the 21st Century the need for a transparent, fully functioning, fully funded, efficiently run system is critical, the cost of which should be borne by all constituents. However, the industry recognizes that migrating from the fee structure that exists today to full funding for these costs from general revenues will take time and is recognized as a long-term goal of the industry.

1400 16th Street, NW Suite 600 Washington, DC 20036 Main 202.785.0081 Fax 202.785.0721 www.ctia.org

DEPARTMENT OF MANAGEMENT
SERVICES

"We serve those who serve Florida."

JEB BUSH
Governor

Tom Lewis, Jr.
Secretary

MyFlorida.com

February 02, 2006

To: Wireless Service Providers

RE: Intent for Refund of Wireless Prepaid E911 Fees

Based on the Florida Attorney General Advisory Legal Opinion #AGO 2005-66 (attached) the Florida Wireless 911 Board has been advised that prior to July 2003 fees for prepaid subscribers should not have been remitted to the Board.

The Board would like to request that if your company anticipates submitting a request for refund that your request be received within the next 60 days (no later than May 1, 2006). Included in the request for refund should be a certified invoice by month and by county (if available).

Please call me at (850-921-2334) or Penney Taylor (850-414-9636) or email john.ford@dms.myflorida.com or penney.taylor@dms.myflorida.com with any questions and/or concerns related to this request.

Request for refunds should be mailed to:

Florida Wireless 911 Board
Post Office Box 7117
Tallahassee, Florida 32314

On behalf of the Florida Wireless 911 Board, I would like to thank you for your support in achieving Wireless Phase II services within the State of Florida.

Sincerely,

John C. Ford
Interim Deputy Secretary and Chairman
Wireless 911 Board

JCF:pwt:wirelessprepaidintent.doc

Attachment

Wireless 911 Board
4030 Esplanade Way
Tallahassee, Florida
32399-0950

Telephone:
850-921-2334

Fax:
850-922-5162

Internet:
www.myflorida.com

Florida Attorney General
Advisory Legal Opinion

Number: AGO 2005-66
Date: December 12, 2005
Subject: Wireless 911 Board, authority to sue/collect fees

Mr. John C. Ford
Florida Department of Management Services
4030 Esplanade Way
Tallahassee, Florida 32399-0950

RE: TELEPHONES - FEES - EMERGENCIES - FLORIDA WIRELESS 911 BOARD - authority of Florida Wireless 911 Board to sue; responsibility of Wireless 911 providers to collect and remit fees. ss. 365.172 - 365.174, Fla. Stat.

Dear Mr. Ford:

On behalf of the Florida Wireless 911 Board, you have asked for my opinion on substantially the following questions:

1. Is the Florida Wireless 911 Board authorized to sue providers of E911 service who do not remit the appropriate fee to the board?

2. Are providers still responsible for remitting the E911 wireless fee if they can demonstrate that they do not have the technology to determine whether a wireless service customer has a sufficient positive balance as of the last day of each month?

3. Were prepaid wireless providers required to collect and remit the Wireless E911 fee to the board prior to the passage of Chapter 2003-182, Laws of Florida?

Section 365.172, Florida Statutes, is the "Wireless Emergency Communications Act." The Legislature enacted this provision in recognition of the complexities that wireless communications service creates for providing emergency 911 services. The act reflects the Legislature's concern that adequate funding be available to wireless telephone service providers and counties that operate 911 and E911 systems to recover the costs involved in designing, purchasing, installing, testing, and operating the enhanced facilities, systems, and services necessary to comply with federally mandated E911 services.[1]

In adopting the Wireless Emergency Communications Act, the

Legislature expressed its intent to:

"1. Establish and implement a comprehensive statewide emergency telephone number system that will provide wireless telephone users with rapid direct access to public safety agencies by dialing the telephone number '911.'
2. Provide funds to local governments to pay the cost of installing and operating wireless 911 systems and to reimburse wireless telephone service providers for costs incurred to provide 911 or enhanced 911 services.
3. Levy a reasonable fee on subscribers of wireless telephone service to accomplish these purposes."[2]

The statute establishes the Wireless 911 Board to administer the fee imposed under the statute. As provided by the statute, administration of the fee includes "receiving revenues derived from the fee; distributing portions of such revenues to providers, counties, and the [State Technology Office]."[3]

Question One

You have asked whether the Wireless 911 Board is empowered to sue service providers who do not remit the Wireless E911 fee prescribed by section 365.172(8), Florida Statutes. Pursuant to section 365.172 (8), Florida Statutes (2005):

"(a) Each home service provider shall collect a monthly fee imposed on each customer whose place of primary use is within this state. For purposes of this section, the state and local governments are not customers. The rate of the fee shall be 50 cents per month per each service number, beginning August 1, 1999. The fee shall apply uniformly and be imposed throughout the state.
(b) The fee is established to ensure full recovery for providers and for counties, over a reasonable period, of the costs associated with developing and maintaining an E911 system on a technologically and competitively neutral basis.
(c) After July 1, 2001, the board may adjust the allocation percentages provided in s. 365.173 or reduce the amount of the fee, or both, if necessary to ensure full cost recovery or prevent overrecovery [sic] of costs incurred in the provision of E911 service, including costs incurred or projected to be incurred to comply with the order. Any new allocation percentages or reduced fee may not be adjusted for 1 year. The fee may not exceed 50 cents per month per each service number.
(d) State and local taxes do not apply to the fee.
(e) A local government may not levy any additional fee on wireless providers or subscribers for the provision of E911 service."

Nothing in the act defines a "home service provider," although a "provider" or "wireless provider" is defined as a person or entity

who provides service and is either subject to the requirements of specified federal orders[4] or "[e]lects to provide wireless 911 service or E911 service in this state."[5]

Section 365.172(6), Florida Statutes (2005), prescribes the authority of the board. The board is authorized to:

"1. Administer the E911 fee.
2. Implement, maintain, and oversee the fund.
3. Review and oversee the disbursement of the revenues deposited into the fund as provided in s. 365.173. . . . .
* * *
9. *Sue and be sued*, and appear and defend in all actions and proceedings, in its corporate name to the same extent as a natural person.
* * *
12. The board may adopt rules under ss. 120.536(1) and 120.54 to implement this section and ss. 365.173 and 365.174."

As specifically provided in section 365.172(6)(a)9., Florida Statutes (2005), the board is authorized to sue and be sued. Therefore, it is my opinion that the Wireless 911 Board is authorized to sue service providers who do not remit the appropriate Wireless E911 fee to the board.

Question Two

You have asked whether wireless service providers are responsible for remitting the E911 wireless fee prescribed by section 365.172(8), Florida Statutes (2005), if the providers are able to demonstrate that, due to their business model and methodology, they do not have the technology to determine whether a wireless service customer has a positive balance on the last day of the month.

Section 365.172(8), Florida Statutes (2005), requires each provider to collect a 50-cent monthly fee from each customer who uses the service primarily within Florida. The fee is assessed on each service number and is imposed throughout the state.[6] The purpose of the fee is to ensure that providers and counties recover the full costs of developing and maintaining an E911 system.[7] The statute defines the term "provider" to include "any person or entity that resells wireless service and was not assessed the fee by its resale supplier."[8]

Section 365.172(9)(b), Florida Statutes, makes a provision for calculating the monthly wireless 911 surcharge:

"In the case of prepaid wireless telephone service, the monthly wireless 911 surcharge imposed by subsection (8) shall be remitted based upon each prepaid wireless telephone associated with this

state, for each wireless service customer that has a sufficient positive balance as of the last day of each month. The surcharge shall be remitted in any manner consistent with the wireless provider's existing operating or technological abilities, such as customer address, location associated with the MTN [mobile telephone number], or reasonable allocation method based upon other comparable relevant data. The surcharge amount or an equivalent number of minutes may be reduced from the prepaid subscriber's account since a direct billing may not be possible. However, collection of the wireless 911 surcharge in the manner of a reduction of value or minutes from the prepaid subscriber's account does not constitute a reduction in the sales price for purposes of taxes that are collected at the point of sale."

As discussed more fully in the staff analysis for HB 1307:

"For prepaid wireless telephone service, the 50 cent monthly wireless 911 surcharge is collected only from each wireless service customer that has a sufficient positive balance as of the last day of each month. As direct billing may not be possible, the surcharge amount, or an equivalent number of minutes, may be reduced from the prepaid subscriber's account. (See, Florida House of Representatives Staff Analysis, HB 1307 w/CS, dated April 13, 2003, Substantive Analysis, s. B, p. 4, 'Management of the Fund.')"

Pursuant to subparagraph (e), each provider must deliver fee revenues to the board within sixty days after the end of the month in which the fee was billed. A monthly report must also be sent to the board showing the number of wireless customers whose place of primary use is in each county.[9]

The statute allows the board to "waive the requirement that the fees and number of customers whose place of primary use is in each county . . . if the provider demonstrates that such waiver is necessary and justified."[10] No comparable language authorizing the waiver of the monthly wireless 911 surcharge imposed pursuant to subsection (8) is evident in the act.

This office, like the courts, is not authorized to embellish legislative requirements with its own notions of what might be appropriate.[11] If additional requirements are to be imposed, or additional authority granted, action must be taken by the Legislature.[12] This office is without authority to qualify or read into this statue an interpretation or define words in the statute in a manner that would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would in effect be an act of legislation, which is exclusively the prerogative of the Legislature.[13]

In the absence of any statutory language authorizing the board to waive the fee assessed by the Legislature and in light of the affirmative duty imposed by the Legislature on wireless 911 providers to calculate and remit a surcharge, it is my opinion that providers are not relieved of their obligation to remit the E911 wireless fee even when they purport not to have the technology to determine whether a wireless service customer has a sufficient positive balance as of the last day of each month.

Question Three

You have asked whether prepaid wireless providers were required to collect and remit the Wireless E911 fee to the board prior to the passage of Chapter 2003-182, Laws of Florida.

It is the general rule that an administrative agency or officer possesses no inherent power and may exercise only such authority as expressly or by necessary implication is conferred by law.[14] If any reasonable doubt exists as to the lawful existence of a particular power, it should not be exercised.[15]

Prior to its amendment in 2003, section 365.172(8), Florida Statutes, imposed a monthly 50-cent fee on each telephone service number and used that fee to fund the wireless 911 emergency telephone system. Each provider collected the fee as a portion of its monthly billing process. The collected fees, minus one percent retained as a reimbursement for administrative costs, were remitted to the Wireless 911 Board.[16] Legislative history for HB 1307, Chapter 2003-182, Laws of Florida, reflects the Legislature's recognition that "[t]he bill imposes a new 50 cent surcharge on prepaid wireless telephone subscribers. A similar fee is currently applicable to non-prepaid wireless subscribers."[17]

Chapter 2003-182, Laws of Florida, added new definitions to section 365.172(3), Florida Statutes, to "facilitate a newly created methodology for collecting a monthly 911 surcharge from prepaid wireless customers."[18] The title of the bill states that it is an act "prescribing a method of collecting the wireless E911 fee in instances in which the wireless telephone service to which the surcharge applies is prepaid[.]"[19] The legislation provides a definition of "[p]repaid wireless telephone service":

"wireless telephone service that is activated in advance by payment for a finite dollar amount of service or for a finite set of minutes that terminate either upon use by a customer and delivery by the wireless provider of an agreed-upon amount of service corresponding to the total dollar amount paid in advance or within a certain period of time following the initial purchase or activation, unless additional payments are made."[20]

With regard to the payment of the wireless 911 surcharge, the 2003 legislation provides for how the fee is to be calculated and remitted. Section 365.172(9)(b), Florida Statutes, provides:

"In the case of prepaid wireless telephone service, the monthly wireless 911 surcharge imposed by subsection (8) shall be remitted based upon each prepaid wireless telephone associated with this state, for each wireless service customer that has a sufficient positive balance as of the last day of each month. The surcharge shall be remitted in any manner consistent with the wireless provider's existing operating or technological abilities, such as customer address, location associated with the MTN, [mobile telephone number] or reasonable allocation method based upon other comparable relevant data. The surcharge amount or an equivalent number of minutes may be reduced from the prepaid subscriber's account since a direct billing may not be possible. However, collection of the wireless 911 surcharge in the manner of a reduction of value or minutes from the prepaid subscriber's account does not constitute a reduction in the sales price for purposes of taxes that are collected at the point of sale."

This language was added to the statute by Chapter 2003-182, Laws of Florida, with the purpose of providing a method for collecting the wireless E911 fee in instances in which the wireless telephone service is prepaid.

In light of the legislative determination that this substantive grant of power was necessary to allow the collection of these fees and the limitations on the exercise of substantive powers by administrative agencies, I cannot say that a prepaid provider was required to collect and remit the wireless E911 fee prescribed by section 365.172(8), Florida Statutes, prior to the effective date of the statute, July 1, 2003.[21]

Sincerely,

Charlie Crist
Attorney General

CC/tgh

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[1] *See* s. 365.172(3)(i), Fla. Stat. (2005), which defines "E911," as follows:

"'E911' is the designation for a wireless enhanced 911 system or wireless enhanced 911 service that is an emergency telephone system or service that provides a subscriber with wireless 911 service and, in addition, directs 911 calls to appropriate public safety answering points by selective routing based on the geographical location from

which the call originated, or as otherwise provided in the state plan under s. 365.171, and that provides for automatic number identification and automatic location-identification features in accordance with the requirements of the order."

[2] Section 365.172(2)(f), Fla. Stat. (2005).

[3] *See* s. 365.172(3)(s), Fla. Stat., defining "[o]ffice" to mean the State Technology Office.

[4] *See* 365.172(3)(t), Fla. Stat., defining "[o]rder."

[5] Section 365.172(3)(v), Fla. Stat. (2005).

[6] Section 365.172(8)(a), Fla. Stat. (2005).

[7] Section 365.172(8)(b), Fla. Stat. (2005).

[8] Section 365.172(9)(g) (2005).

[9] Section 365.172(9)(e), Fla. Stat. (2005).

[10] *Id.*

[11] *Cf., Johnson v. Taggart*, 92 So. 2d 606 (Fla. 1957).

[12] *Id.*, at 608. *And see, Sarasota Herald-Tribune Co. v. Sarasota County*, 632 So. 2d 606, 607 (Fla. 2nd DCA 1993).

[13] *Cf., Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974), and Op. Att'y Gen. Fla. 81-10 (1981).

[14] *See, e.g.*, 67 C.J.S. *Officers* ss. 190, 192 (1978); *Lang v. Walker*, 35 So. 78, 80 (Fla. 1903); *Gessner v. Del-Air Corporation*, 17 So. 2d 522 (Fla. 1944); *Florida State University v. Jenkins*, 323 So. 2d 597 (Fla. 1st DCA 1975), *Lee v. Division of Florida Land Sales and Condominiums*, 474 So. 2d 282 (Fla. 5th DCA 1985); Ops. Att'y Gen. Fla. 04-30 (2004), 86-46 (1986), 85-95 (1985), 78-77 (1978). *See generally*, 73 C.J.S. *Public Administrative Law and Procedure* s. 50 (1983).

[15] *See, e.g., White v. Crandon*, 156 So. 303, 305 (Fla. 1934); *Gessner v. Del-Air, supra.*

[16] Section 365.172(9), Fla. Stat.

[17] See, Florida House of Representatives Staff Analysis, HB 1307 w/CS, dated April 13, 2003, Substantive Analysis, s. A, p. 3, "DOES THE BILL."

[18] *See* House of Representatives Staff Analysis, HB 1307 w/CS, dated April 13, 2003.

[19] Title, HB 1307, 2003 Florida Legislature.

[20] *See* s. 1, Ch. 2003-182, Laws of Florida, adding s. 365.172(3)(o), Fla. Stat.

[21] Section 4, Ch. 2003-182, Laws of Florida, provides the effective date of the act.

STATE OF MICHIGAN

COURT OF APPEALS

TRACFONE WIRELESS, INC.,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

DEPARTMENT OF TREASURY and EMERGENCY TELEPHONE SERVICE COMMITTEE,

Defendants/Cross-Plaintiffs-Appellants/Cross-Appellees.

UNPUBLISHED
June 19, 2008

Nos. 275065; 275942
Court of Claims
LC No. 06-000028-MZ

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

This appeal arises out of the trial court's orders holding that the provisions of the Emergency Telephone Service Enabling Act (ETSEA), MCL 484.1101 *et seq*, do not apply to providers of prepaid wireless cellular telephone services like plaintiff, but also holding that a portion of the fees plaintiff erroneously remitted pursuant to the ETSEA was not recoverable because it was outside the applicable limitations period, and awarding judgment in plaintiff's favor in the amount of $231,432.76.[1] We affirm in part and reverse in part.

Plaintiff is a provider of "commercial mobile radio services" (CMRS) in the form of prepaid, "pay as you go," wireless cellular telephones that are purchased "off the shelf" by consumers at various retail establishments. Plaintiff therefore does not invoice its customers or enter into monthly service contracts with them. In relevant part, the ETSEA requires CMRS providers and retailer to collect a monthly fee from their customers for "each CMRS connection that has a billing address in this state." MCL 484.1408(1). In the years 2000, 2001, 2002, and 2003, plaintiff remitted to defendants a total of $541,574.33 pursuant to that requirement. However, plaintiff contends that it paid its own funds and did so by accident. Plaintiff argues that because it does not have billing addresses or monthly bills for its customers, the 9-1-1 fee

[1] The trial court also granted summary disposition in plaintiff's favor on defendants' counterclaim, and defendants have not appealed that order.

does not apply, so it was not required to collect or remit the fees. When plaintiff discovered the mistake, it informed defendants that it wished the monies refunded. Plaintiff was ultimately informed that it could only obtain a refund by filing the instant suit in the Court of Claims, which plaintiff then did.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id.*, 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id.*, 119-120. Likewise, under MCR 2.116(C)(9), all of the defendant's well-pleaded allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). Under MCR 2.116(C)(10), we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120.

This Court also reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002). Equitable determinations are also reviewed de novo, although the factual findings underlying those determinations are reviewed for clear error. *Blackhawk Development Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

We first address defendants' contention that plaintiff lacks standing. "Whether a party has standing is a question of law that we review de novo." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). In the absence of a particularized injury, no genuine case or controversy can exist between the parties, and therefore the courts lack any power to exercise over those parties. *Id.* Plaintiff must allege and prove that it did or will suffer some kind of actual harm as a consequence of defendants' conduct. *Id.*, 629-631.

Defendants contend that plaintiff has failed to show actual harm because the plain language of the statute requires plaintiff to collect the applicable fees from its customers, not pay the fees itself. However, plaintiff has alleged that it paid the fees out of its own funds by accident, and it has submitted an interrogatory response stating that it did not collect the funds from its customers. The evidence in the record fails to show any indication to the contrary. Plaintiff's injury in fact is the loss of certain monies that plaintiff alleges it was not required to remit. Plaintiff has provided allegations and evidence tending to prove this injury, and defendant has not cast any doubt thereon. We therefore find that plaintiff has standing.

The primary issue in this case is whether, as a pure matter of law, the requirements of MCL 484.1408 apply to prepaid cellular telephone services. At the times relevant to this action,[2] the pertinent provisions of that statute provided as follows:

> (1) Until 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 55 cents per month for each CMRS connection that has a billing address in this state. Beginning 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 52 cents per month for each CMRS connection that has a billing address in this state. The CMRS supplier or reseller shall list the service charge as a separate line item on each bill. The service charge shall be listed on the bill as the "emergency 9-1-1 charge".
>
> * * *
>
> (6) A CMRS supplier or reseller shall implement the billing provisions of this section not later than 120 days after the effective date of this section.

The ETSEA further provides the following relevant definitions in MCL 484.1102:

> (c) "Commercial mobile radio service" or "CMRS" means commercial mobile radio service regulated under section 3 of title I and section 332 of title III of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 USC 153 and 332, and the rules of the federal communications commission or provided under the wireless emergency service order. Commercial mobile radio service or CMRS includes [among other things, cellular telephone service].
>
> * * *
>
> (h) "CMRS connection" means each number assigned to a CMRS customer.
>
> * * *
>
> (x) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.
>
> * * *
>
> (gg) "Service supplier" means a person providing a communication service to a service user in this state.

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[2] The supplied statutory language is the language as enacted in 1999 PA 78, which was the Public Act that added this section to the Emergency Telephone Service Enabling Act by 1999 PA 78. Subsection (1) underwent some minor changes, such as in wording, date references, and amount of money to be charged, but it has remained the same in substance. Subsection (6) was eventually renumbered, and a specific target date inserted, but again substantially unmodified. It is clear that none of the changes are material to the outcome of this appeal, and neither party suggests otherwise.

(hh) "Service user" means a person receiving a communication service.

Plaintiff asserts that it is not a "reseller," but by its own concession it is a "provider," so it is a "supplier" and potentially obligated to collect and remit the fees under MCL 484.1408(1). Significantly, the ETSEA does not define what constitutes a "billing address."

We find it irrelevant that plaintiff does not have a monthly billing cycle. The plain language of the statute requires the fees to be computed on a monthly basis, but not necessarily collected on a monthly basis. There is no inherent restriction on having only one bill, or having a billing cycle of either longer or shorter than one month. The plain language of the statute does mandate at least one "bill," but most importantly, it requires a "billing address."

The term "billing address" is not defined by the ETSEA, but a definition does exist in the Michigan Business Tax Act, MCL 208.1101 *et seq.* According to MCL 208.1261(a), "'[b]illing address' means the location indicated in the books and records of the financial institution on the first day of the tax year or on a later date in the tax year when the customer relationship began as the address where any notice, statement, or bill relating to a customer's account is mailed." This is consistent with the dictionary definition of "bill," which in relevant part means either "a statement of money owed for goods or services supplied" or "to send a list of charges to." Random House Webster's College Dictionary, 2001 ed. Given that bill*ing* is either a present participle or a gerund, "bill*ing* address" must refer to the *verb* form of "bill." We are persuaded that a "billing address" must in some way pertain to ongoing contact information for a customer. In particular, a "billing address" requires a *physical* location to which some kind of *written* information regarding an "account" could be delivered, and thereby relied on to be received, by a customer with some kind of ongoing relationship with the supplier.

Defendants contend that discovery would reveal that plaintiff's billing practices entail collection of extensive information from its customers, including customers' billing addresses. However, defendants admit that plaintiff "does not enter into monthly service contracts with its customers or invoice its customers." Because the meaning of "billing address" entails actually sending bills on an account to a customer, the fact that plaintiff might know where its customers live does not necessarily mean plaintiff has a "billing address" for those customers. In other words, there can be no billing address if there is no billing. Irrespective of what data plaintiff collects from its CMRS connection customers, if the CMRS connections do not have designated physical addresses for the purpose of receiving information about ongoing accounts, those CMRS connections do not have "billing addresses" within the meaning of MCL 484.1408. Because the CMRS connections in this case do not have "billing addresses," the 9-1-1 service charge need not be collected on them, as the trial court correctly found.

Nevertheless, the parties do not dispute that as a general matter, no Michigan governmental entity is authorized to refund taxes unless expressly permitted to do so by enactment of the Legislature, see *F.M. Sibley Lumber Co v Dep't of Revenue*, 311 Mich 654, 661; 19 NW2d 132 (1945), and the ETSEA does not expressly provide for a refund of plaintiff's tax payments here. However, plaintiff's refund claim is based on equity. "'It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."' *Blanchard v Detroit*, 253 Mich 491, 495; 235

NW 230 (1931), quoting *Ward v Love Co*, 253 US 17, 24; 40 S Ct 419 (1920) and cases cited therein.

In *Spoon-Shacket v Oakland Co*, 356 Mich 151, 168; 97 NW2d 25 (1959), our Supreme Court upheld "the right of taxpayers to equitable relief from the unconscionable effect of crass mistakes of public officials in the field of taxation; mistakes gross enough to constitute fraud." More than sixty years previously, "[t]he right of a party, from whom has been exacted payment of rates of carriage in excess of those fixed by charter or statute, to recover the overcharge, [was] no longer open to serious question." *Pingree v Mut Gas Co*, 107 Mich 156, 158; 65 NW2d 6 (1895). However, the parties do not actually dispute that plaintiff would be entitled to a refund of any taxes or fees paid due to fraud or coercion by defendants. Rather, defendants contend that plaintiff's payments are not recoverable because they were voluntarily made, with full actual or constructive knowledge of the facts and applicable law.

Some of Michigan's earliest published cases regarded it as a settled, even presumptive, issue that voluntarily-paid monies were simply not recoverable. See *First Nat'l Bank v Watkins*, 21 Mich 483, 488-490 (1870); see also, generally, *Thompson v Detroit*, 114 Mich 502; 72 NW 320 (1897). At common law, actual duress was necessary for a payment to be considered involuntary. *General Discount Corp v Detroit*, 306 Mich 458, 465; 11 NW2d 203 (1943). But the rule evolved to permit recovery of unnecessary payments in the absence of duress and even without protest, if the payor made those payments "by reason of a mistake or ignorance of a material fact;" ignorance of a fact is equivalent to a mistake of fact, and either will make the payment effectively involuntary. *Pingree*, *supra* at 159-160. The same may be true even if the payor was negligent in failing to ascertain the true facts, "subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has changed in consequence of the payment, and it would be inequitable to allow a recovery." *Id.*, 160; *Walker v Conat*, 65 Mich 194, 197-198; 31 NW 786 (1887).

Nevertheless, a party with "full knowledge of the facts," or even merely on notice of the facts and therefore "chargeable with the knowledge," cannot recover voluntarily-paid money by claiming a mistake. *Montgomery Ward & Co v Williams*, 330 Mich 275, 284-285; 47 NW2d 607 (1951); see also *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 471 Mich 940, 940-941; 690 NW2d 93 (2004) ("[p]laintiff had access to all the necessary information, and its error is not excused by its own carelessness or lack of due diligence."). Where a party is not ignorant of the law, the party's rights under the law, and the facts of the party's situation; and where the recipient of the monies has not infringed on the payor's free will by action, inaction, or mere possession of exclusive knowledge; payment will not be considered to have been made under duress. *Beachlawn Corp v St Clair Shores*, 370 Mich 128, 131-133; 121 NW2d 427 (1963).

There is no contention or evidence that the payments plaintiff remitted were because of any "artifice, fraud, or deception on the part of the payee, or duress of the person or goods of the person making the payment." *Pingree*, *supra* at 157. Plaintiff repeatedly emphasizes that the payments were made solely because its tax administration firm made a unilateral mistake, not because of any conduct by defendants. Furthermore, neither party had exclusive knowledge of the applicable law, nor did defendants know anything about plaintiff's factual situation that plaintiff did not also know. Most importantly, it is apparent that the tax administration firm was plaintiff's agent. See *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). "A party is responsible for any action or

inaction by the party or the party's agent." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 224; 600 NW2d 638 (1999). As a consequence, the payments made by plaintiff's tax administration firm are attributable to plaintiff.

We find that plaintiff – through its agent – therefore knowingly remitted the 9-1-1 fees. Moreover, plaintiff did so under "the mistaken factual premise that [plaintiff] was a monthly billing wireless provider instead of a provider that sold prepaid wireless telephones and minutes to customers through retail outlets." In other words, plaintiff asserts that it was under a mistake of fact about *the nature of itself*. But plaintiff must have had full knowledge of the nature of its services at the time it made those payments, and as a consequence, we conclude that its payments were voluntary. See *Farm Bureau Mut Ins Co of Michigan v Buckallew*, *supra* at 940-941. This is not analogous to the case of a person inadvertently putting the decimal point in the wrong place on a check, where that person might indeed pay under a misapprehension of fact as to how much he or she was paying. Plaintiff was aware of all of the material facts – the amount and fact of payment, and the nature of itself – at the time it paid. We therefore agree with defendants that, because plaintiff remitted them voluntarily, plaintiff cannot recover the fees.

We affirm the trial court's holding that providers of prepaid wireless telecommunications services like plaintiff are not required to collect or remit the 9-1-1 fees under the ETSEA. However, we reverse the trial court's award of $231,432.76 in plaintiff's favor. In light of our determinations of those issues, we need not address the issues pertaining to the trial court's award of fees, the statute of limitations, or the notice provisions of the Court of Claims Act.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

COMMONWEALTH OF KENTUCKY COMMERCIAL MOBILE RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD,	)	Case No. 3:08-CV-660-JGH
PLAINTIFF,	)	
v.	)	
TRACFONE WIRELESS, INC.,	)	*(ELECTRONICALLY FILED)*
DEFENDANT,	)	

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

CTIA – The Wireless Association® ("CTIA"), respectfully submits this memorandum in support of its motion for leave to participate as *amicus curiae*.

CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 700 MHz, cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. The Kentucky CMRS Board's proposed application of the CMRS service charge to prepaid wireless service will have industry-wide significance to providers, such as Tracfone Wireless, Inc. ("Tracfone"), as well as their customers.

Defendant, Tracfone, through its counsel of record, has consented to CTIA's participation in this case as *amicus*. CTIA would be represented by the undersigned attorneys authorized to practice law in the Commonwealth of Kentucky and in this Court. Although Tracfone has consented to CTIA's participation as *amicus*, Plaintiff, CMRS Emergency

Telecommunications Board, through its counsel of record, has indicated that it would object. CTIA, however, respectfully submits that this case is important not only to Tracfone, but to the industry as a whole and thus, this Court should allow CTIA to participate as *amicus* for the reasons that follow.

CTIA has followed the progress of this action. It has, by counsel, reviewed the relevant pleadings filed to date. CITA is also familiar with the regulation of similar issues in other jurisdictions around the country.

CTIA offers the unique perspective of national wholesale and retail prepaid wireless service providers. This perspective allows CTIA to provide the court with a variety of practical examples of how applying the CMRS service charge to prepaid wireless service would be contrary to statute. Further, although they do not argue the constitutional impediments as a basis for this Court's decision, this practical concern is important.

CTIA has a strong interest in this case because several other prepaid wireless service providers, in addition to Tracfone, that are members of CTIA have disputed the propriety of the imposition of the CMRS service charge on prepaid wireless services under Kentucky's pre-July 2006 E-911 Statutes. The CMRS service charge is entirely incompatible with the sale and operation of prepaid wireless services because, *inter alia*, prepaid wireless service is charged by-the-minute, not billed monthly and the service provider and/or seller does not know whether the user is located within Kentucky.

It is therefore well within the discretion of this Court to allow participation of CTIA as *amicus*. *See, e.g., United States of America v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Simply put, by allowing CTIA to participate as *amicus,* the Court will have the benefit of CTIA's perspective as to the larger impact of this case.

For the foregoing reasons, CTIA should be permitted to participate as *amicus* and the Court should accept his brief for filing in this case.

Dated: April 12, 2010

Respectfully submitted,

/s/ John K. Bush
John K. Bush
Mark A. Loyd
Greenebaum Doll & McDonald PLLC
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202-3197
(502) 589-4200

Attorneys for Amicus Curiae
CTIA – The Wireless Association®

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

COMMONWEALTH OF KENTUCKY COMMERCIAL MOBILE RADIO SERVICE EMERGENCY TELECOMMUNICATIONS BOARD,	)	Case No. 3:08-CV-660-JGH
PLAINTIFF,	)	
v.	)	*(ELECTRONICALLY FILED)*
TRACFONE WIRELESS, INC.	)	
DEFENDANT.	)	

BRIEF *AMICUS CURIAE* OF CTIA – THE WIRELESS ASSOCIATION® IN SUPPORT OF DEFENDANT

Introduction

This case arises from a dispute between Plaintiff, Commercial Mobile Radio Services Emergency Telecommunications Board of Kentucky ("CMRS Board"), and Defendant, Tracfone Wireless, Inc. ("Tracfone"), as to, *inter alia*, whether or not the statutory provisions for Wireless Enhanced Emergency 911 Systems, set forth in KRS 65.7621 to 65.7643 as in effect from roughly July 1998 through June 2006 (the "E-911 Statutes"), authorize the levy and collection of a $0.70 per month CMRS service charge for each CMRS connection within Kentucky to apply to not only postpaid wireless services, but also prepaid wireless services.[1]

As discussed below, this issue is of concern to all prepaid wireless service providers that have conducted their respective businesses in reliance on the statutory language of the E-911 statutes. *Amicus Curiae,* CTIA – the Wireless Association®, is the industry trade association

[1] This brief does not address the scope and effect of the E-911 statutes after they were amended by the Kentucky General Assembly in 2006.

whose members seek the Court's declaration that the pre-June 2006 wording of the E-911 statutes means what it says, which is that prepaid wireless services are not subject to the CMRS service charge.

Identity and Interest of Amicus Curiae

CTIA - The Wireless Association® ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 700 MHz, cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. The Kentucky CMRS Board's proposed application of the CMRS service charge to prepaid wireless service will have industry-wide significance to providers, such as Tracfone Wireless, Inc. ("Tracfone") and others, as well as their customers.

Amicus has a strong interest in this case because several other prepaid wireless service providers, in addition to Tracfone, that are members of CTIA have disputed the propriety of the imposition of the CMRS service charge on prepaid wireless services under Kentucky's pre-July 2006 E-911 Statutes. Consequently, CTIA submits this Brief to provide the wireless industry's perspective on the application and scope of Kentucky's CMRS service charge.

Statement

1. Postpaid Wireless Services (Billed Monthly) Versus Prepaid Wireless Services (No Bill)

Tracfone and other members of CTIA provide wireless service.[2] There are two primary

[2] *See generally* KRS 65.7621(4) ("'CMRS' means commercial mobile radio service under Sections 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. secs. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, as it existed on August 10, 1993. The term includes the term wireless and service provided by any wireless real time two-way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line....").

methods of providing and billing wireless service: postpaid and prepaid.

Postpaid wireless service is the traditional method of providing and billing wireless service wherein the customer "signs-up" with a provider. This typically involves entering into a service contract that may require, as a prerequisite, either an acceptable credit history or a security deposit. The contract normally specifies the number of minutes, text messages, etc. for which the customer is billed at a flat rate and an additional charge for usage above the specified levels; as such, the customer has, in effect, virtually unlimited credit. As a matter of course, the provider bills the customer each month for wireless services used.

In contrast, prepaid wireless service, such as that provided by Tracfone, is an alternative method of delivery and billing where the customer pays in advance, and the prepayment is consumed by their use of wireless services. In this model, a purchaser buys a prepaid wireless handset with a fixed number of prepaid minutes at a retail outlet (*e.g.*, a big box retail store, etc.). The purchaser activates the wireless service via a toll free number or website to enable the user to obtain access to the respective provider's wireless network. A user can buy more minutes at a participating retail store by purchasing another prepaid wireless service card to "reload" the handset. Under this model, prepaid customers are customers of the provider only when they have unused prepaid wireless service minutes.

Note that because of this delivery and billing methodology, a prepaid wireless service user may or may not be the purchaser. For example, the user may be the purchaser's college student child, elderly parent, etc. And, the state of purchase may not necessarily be the place of primary use. For example, the primary place of use of a phone purchased in Louisville, Kentucky could very well be across the Ohio River in Southern Indiana.

Prepaid wireless service programs enable customers to obtain wireless services as needed or as they can afford it. Prepaid wireless service customers need not enter into contracts, have an

acceptable credit history, shell out a security deposit or otherwise commit to pay fees on monthly bills. Because prepaid wireless services are, as this designation suggests, paid for by customers in advance (sometimes with cash), there is no need for bills; so, providers do not send bills.

2. **The Pre-July 2006 Statutory Scheme Authorizing the Levy and Collection of the CMRS Service Charge**

The statutory provisions for Wireless Enhanced Emergency 911 Systems are set forth in KRS 65.7621 to 65.7643 (the, "E-911 Statutes"). The powers and duties of the Commercial Mobile Radio Services Emergency Telecommunications Board of Kentucky ("CMRS Board") [KRS 65.7621(5)] are set forth in KRS 65.7629.

The one most relevant to the issue here is the CMRS Board's "levy" of the CMRS emergency telephone service charge ("CMRS service charge"), which is "levied under KRS 65.7629(3) and collected under KRS 65.7635." KRS 65.7621(10). The CMRS Board has the power to:

> To collect the CMRS service charge[3] from each CMRS connection [with a place of primary use, as defined in 4 U.S.C. sec. 124,][4] within the Commonwealth. The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly....

KRS 65.7629(3) (as enacted by 1998 Ky. Acts, c. 535, § 5; [ ] supplied to reflect an amendment

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[3] "The term 'charges for mobile telecommunications services' means any charge for, or associated with, the provision of commercial mobile radio service, as defined in section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, that is billed to the customer by or for the customer's home service provider regardless of whether individual transmissions originate or terminate within the licensed service area of the home service provider." 4 U.S.C. § 124(1) (added by the Mobile Telecommunications Sourcing Act ["MTSA"], Pub. L. No. 106-252, 14 Stat. 626 (2000), applicable only to customer bills issued after the first day of the first month beginning more than 2 years after July 28, 2000).

[4] "The term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be--(A) the residential street address or the primary business street address of the customer; and (B) within the licensed service area of the home service provider." 4 U.S.C. § 124(8) (added by the MTSA in 2000). Notably, "[Section 116] through 126 of [the MTSA - including Section 124] do not apply to the determination of the taxing situs of prepaid telephone calling services...." 4 U.S.C. § 116(c)(1).

made by 2002 Ky. Acts, c. 69, § 3; footnote added).[5] Notice that the CMRS service charge is a per month charge of $0.70 and levied from each CMRS connection, essentially, from each CMRS customer – – it is not levied on each CMRS provider.[6]

Each billing CMRS provider, however, does [per KRS 65.7621(10) and KRS 65.7629(3)] collect from each CMRS connection/customer the CMRS service charge, which is to be listed as a separate entry on each bill that includes such a charge:

> Each CMRS provider shall act as a collection agent for the CMRS fund and shall, as part of the provider's *normal monthly billing process*, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the *billing* provider provides CMRS. Each *billing* provider shall list the CMRS service charge as a separate entry *on each bill* which includes a CMRS service charge. If a CMRS provider receives a partial payment for *a monthly bill* from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider.

KRS 65.7635(1) (emphasis added).[7] Observe that when a CMRS customer short pays a CMRS

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[5] As amended by the 2006 General Assembly, KRS 65.7629(3) now provides:

> To collect the CMRS service charge from each CMRS connection:
> (a) With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; or
> (b) **For prepaid CMRS connections:**
> **1. With a place of primary use, as defined in 4 U.S.C. sec. 124, within the Commonwealth; or**
> **2. With a geographical location associated with the first six (6) digits, or NPA/NXX, of the mobile telephone number is inside the geographic boundaries of the Commonwealth.**
> The CMRS service charge shall be seventy cents ($0.70) per month per CMRS connection, and shall be collected in accordance with KRS 65.7635 beginning August 15, 1998. The amount of the CMRS service charge shall not be increased except by act of the General Assembly;
> KRS 65.7629(3) (emphasized text added by 2006 Ky. Acts, c. 219, § 4).

[6] KRS 65.7623(6) defines a "CMRS connection" to mean "a mobile handset telephone number assigned to a CMRS customer..." KRS 65.7623(7) defines a "CMRS customer" to mean "a person to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation."

[7] As amended by the 2006 General Assembly, KRS 65.7635(1) now provides:

> Each CMRS provider shall act as a collection agent for the CMRS fund. ~~and~~ **From its customers, the provider** shall, as part of the provider's ~~normal monthly~~ billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS. Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge. If a CMRS provider receives a partial payment for a monthly bill from a CMRS customer, the provider shall first apply the payment against the amount the CMRS customer owes the CMRS provider. **For CMRS customers who purchase CMRS services on a prepaid basis, the CMRS service charge shall be determined according to one (1) of the following methodologies as elected by the CMRS provider:**
> **(a) The CMRS provider shall collect, on a monthly basis, the CMRS service charge specified in**

provider, the partial payment goes first to amounts owed to the CMRS provider – not against any CMRS service charge due.

It is important to highlight that a CMRS provider has no obligation to enforce collection of CMRS service charges billed to CMRS customers who fail to remit the CMRS service charge. The Commonwealth, however, may pursue CMRS customers in the Circuit Court of the Kentucky county where the bill for CMRS service is regularly delivered:

> *A CMRS provider has no obligation to take any legal action to enforce the collection of the CMRS service charges for which any CMRS customer is billed.* Collection actions to enforce the collection of the CMRS service charge against any CMRS customer may, however, be initiated by the state, on behalf of the board, *in the Circuit Court of the county where the bill for CMRS service is regularly delivered,* and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

KRS 65.7635(2) (emphasis added).

Each CMRS provider remits CMRS services charges "collected" (less a cost of collection administrative fee of 1.5% of CMRS charges collected each month [KRS 65.7635(4)]) to the CMRS Board.

> *All CMRS service charges imposed under KRS 65.7621 to 65.7643 collected by each CMRS provider, less the administrative fee described in subsection (4) of this section, are due and payable to the board monthly and shall be remitted on or before sixty (60) days after the end of the calendar month.* Collection actions may be initiated by the state, on behalf of the board, in the Franklin Circuit Court or any other court of competent jurisdiction, and the reasonable costs and attorneys' fees which are incurred in connection with any such collection action may be awarded by the court to the prevailing party in the action.

> **KRS 65.7629(3) from each active customer whose account balance is equal to or greater than the amount of service charge; or**
> **(b) The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency telephone service reporting period by fifty dollars ($50), multiply the quotient by the service charge amount, and pay the resulting amount to the board; or**
> **(c) In the case of CMRS providers that do not have the ability to access or debit end user accounts, and do not have retail contact with the end-user or purchaser of prepaid wireless airtime, the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge from such end users.**

KRS 65.7635(1) (emphasized text added or ~~deleted~~ by 2006 Ky. Acts, c. 219, § 4)

KRS 65.7635(5) (emphasis added). This subsection does not obligate a CMRS provider to remit uncollected fees.

Argument

I. THE CLEAR TEXT OF THE PRE-JULY 2006 CMRS SERVICE CHARGE STATUTES DO NOT AUTHORIZE THE IMPOSITION OF A CMRS SERVICE CHARGE ON PREPAID WIRELESS SERVICE PROVIDED BY NON-BILLING PROVIDERS SUCH AS TRACFONE

During the time periods relevant herein, Kentucky's CMRS service charge statutory scheme authorized the CMRS Board to levy a $0.70 per month CMRS service charge from each CMRS connection within Kentucky collected by each billing CMRS provider as a part of their normal monthly billing process from their CMRS customers. *See* KRS 65.7621(10); KRS 65.7629(3); KRS 65.7635. Accordingly, the CMRS service charge has been properly levied on postpaid wireless service, collected by CMRS providers from their postpaid wireless service customers on their monthly bills and remitted to the CMRS Board.

This statutory scheme, however, did not impose an obligation on a non-billing CMRS provider, such as Tracfone, to collect a CMRS service charge from a prepaid wireless customer to whom no monthly bills were sent. Thus, the involved statutes did not authorize the levy or collection of the CMRS service charge on prepaid wireless service. This is evident in the clear text of the statutes authorizing the imposition of the CMRS service charge.

The statutory text of the CMRS service charge statutes [KRS 65.7629(3) and KRS 65.7635 and the definitions provided in KRS 65.7621] authorize the CMRS Board to levy the CMRS service charge on CMRS connections and requires each billing CMRS provider to collect this charge from their customers via monthly bills. KRS 65.7629(3) required the per month CMRS service charge to be collected in accordance with KRS 65.7635, and that statute quite specifically required collection of this charge via a CMRS service provider's normal monthly

billing process – – a process that occurs only in the context of postpaid wireless service. For prepaid wireless service, there is no monthly billing process and thus no billing CMRS provider, and so, KRS 65.7635 provides for no mechanism to collect the CMRS service charge for prepaid wireless service.

The Kentucky General Assembly has not given CMRS Board the authority to levy the CMRS service charge on prepaid wireless service. In this regard, "It is fundamental that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim." *Dep't for Natural Res. & Envtl. Prot. v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978) (quotation omitted); *see also* *Kerr v. Kentucky State Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 797 S.W.2d 714, 717 (Ky. App. 1990) ("Regulatory agencies are creatures of statute, and have no powers of their own...."). An administrative agency, such as the CMRS Board, cannot exercise authority that the General Assembly did not vest in it. *Stearns Coal*, 563 S.W.2d at 473.

An administrative agency's attempted exercise of a power beyond that authorized by statute – such as the CMRS Board's attempted levy of a CMRS service charge on prepaid wireless service – is *ultra vires* and void. *See Id.; Martin v. Chandler*, 318 S.W.2d 40, 44-45 (Ky. 1958). A case example in the context of a levy demonstrates that this rule operates to prohibit an administrative governmental agency from collecting charges when it is without statutory authority to do so as the CMRS Board is here without statutory authority to levy and collect the CMRS service charge.

In *Stierle v. Sanitation Dist. No. 1 of Jefferson County*, 243 S.W.2d 678, 680 (Ky. 1951), Kentucky's then highest court held that although a statute granted the Sanitation District, a governmental entity, "the power to make and collect charges for services from 'users' of its sanitary works," the statute did not grant it "the power to collect charges from persons who

[we]re not using its sanitary works." As such, property owners were entitled: [i] to be relieved of charges from the Sanitation District until it actually furnished sewer services to them; and, [ii] to recover sums for unauthorized charges made by the Sanitation District. *Id.* at 681.[8]

The relevant statutes [KRS 65.7629(3) and KRS 65.7635] must clearly and explicitly grant the CMRS Board the authority to validly impose the CMRS service charge on prepaid wireless services. *See Stearns Coal*, 563 S.W.2d at 473; *Stierle*, 243 S.W.2d at 680. Thus, the issue of whether or not the CMRS service charge can be imposed on prepaid wireless services turns on the construction of these two statutes.

The "goal in construing a statute is to give effect to the intent of the General Assembly, and...that intent [is derived], if at all possible, from the plain meaning of the language the General Assembly chose." *King Drugs, Inc. v. Revenue Cabinet*, 250 S.W.3d 643, 645 (Ky. 2008). It has long been the law that, "The best way in most cases to ascertain such intent or to determine the meaning of a statute is to look to the language used...." *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962); *see also Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).

The discernment of the legislative intent underlying the levy and collection of the CMRS service charge requires an examination of the whole act. "The presumption is that the Legislature intends an Act to be effective as an entirety." *George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). Multiple references to collection of the CMRS service charge via monthly bills permeate the E-911 Statutes.

The CMRS service charge is levied under KRS 65.7629(3) and collected under KRS 65.7635. *See* KRS 65.7621(10). KRS 65.7629(3) provides for a "per month" charge to be

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[8] *See also State Highway Comm'n v. County Bd. of Educ.*, 264 Ky. 95, 94 S.W.2d 302 (Ky. 1936) (holding that statutory text did not support the extension of the State Highway Commission's authority to authorize toll charges to payment of toll by students for travel on a toll road while attending school so that such toll charge was invalid).

collected under KRS 65.7635, and that statute explicitly requires collection of the charge by the CMRS "billing provider" via the "normal monthly billing process." References to bills or billing [7 times], monthly bills or billing [2 times], and months [6 times] are spread throughout KRS 65.7635. But, there is a notable absence of any mention of anything that could be construed to authorize the imposition of the CMRS service charge on prepaid wireless service for which there is no bill. Moreover, prepaid wireless service is, consistent with its nomenclature, prepaid; so, there is no "monthly billing process" [KRS 65.7635] and thus falls completely outside of the intended scope of the statutorily mandated CHMR service charge collection mechanism.

No text in these statutes authorized the CMRS Board to hold a non-billing CMRS provider of prepaid wireless services, such as Tracfone, liable for CMRS service charges that it did not bill or collect. KRS 65.7635(1) requires the "billing provider" to collect the CMRS service charge – not a non-billing provider. Even when a "billing provider" actually bills the CMRS service charge, that provider need only pay the CMRS Board those monthly CMRS service charges that it actually collected. *See* KRS 65.7635(1)&(5).

In drafting the E-911 Statutes, the General Assembly left no room for conjecture or guesswork as to the extent of the CMRS service charge defined in KRS 65.7621(10) to be levied under KRS 65.7629(3) and collected under KRS 65.7635. And, in ascertaining the Legislative intent of statutory text, it is inappropriate to "surmise[e]" [*O'Daniel*, 153 S.W.3d at 819] or to "guess what the Legislature intended but did not express..." [*Gateway*, 356 S.W.2d at 249]. "In other words, [it is] assume[d] that the Legislature meant exactly what it said, and said exactly what it meant." *O'Daniel*, 153 S.W.3d at 819 (quotations and alterations omitted; [ ] supplied).

"If a plain reading of [a] statute yields a reasonable legislative intent, then that reading is decisive and must be given effect...." *King Drugs*, 250 S.W.3d at 645. Here, a plain reading of the E-911 Statutes yields a reasonable legislative intent, *i.e.*, the CMRS Board is authorized to

collect the CMRS service charge when the billing CMRS provider bills and collects it from a CMRS connection/customer as in the case of postpaid wireless service, but not when it does not, *i.e.*, in the case of prepaid wireless service. This is reasonable because, *inter alia*, the CMRS service charge is collected only on "each CMRS connection...*within* the Commonwealth" [KRS 65.7629(3) (emphasis supplied)], and the place of the purchase of prepaid wireless service does not always coincide with the place of the CMRS connection; thus, an attempt to impose the CMRS service charge on prepaid wireless service, which was obviously designed to be imposed on postpaid wireless service would result in extraterritorial CMRS service charges. Accordingly, it is reasonable to give effect to a plain reading of the involved E-911 Statutes as not authorizing the levy and collection of the CMRS service charge on prepaid wireless service.

That plain reading "must be given effect regardless of the canons [of statutory construction] and regardless of [an] estimate of the statute's wisdom." *Id.* ([ ] supplied from case). In this regard, the wisdom of imposing the CMRS service charge on postpaid but not prepaid wireless service has no bearing on the construction of the involved E-911 statutes. By selecting and using the words that it did, the General Assembly has designated postpaid wireless service to be subject to the CMRS service charge, but <u>not</u> prepaid wireless services.

II. THE INVOLVED E-911 STATUTES ARE UNAMBIGUOUS, BUT ASSUMING *ARGUENDO* THAT THEY WERE AMBIGUOUS, THEY WOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE POTENTIAL OBLIGEE CMRS PROVIDER AND STRICTLY CONSTRUED AGAINST THE GOVERNMENT SO AS TO NOT IMPOSE THE CMRS SERVICE CHARGE ON PREPAID WIRELESS SERVICE

The unambiguous text of KRS 65.7621, KRS 65.7629(3) and KRS 65.7635 does not authorize the CMRS Board to hold a non-billing CMRS provider, such as Tracfone, liable for a CMRS service charge on prepaid wireless service that the CMRS provider neither billed nor collected, as demonstrated above.

"A statute is ambiguous when it is capable of being understood in two or more different

senses by reasonably well-informed persons." 3A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 66:03 (6th ed. rev. 2003). There are two species of ambiguity: patent and latent. *See Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809 (Ky. App. 2000). A patent ambiguity is one that clearly appears on the face of the involved statute, and in contrast, a latent ambiguity is one that does not appear on the face of the statute but is known to exist only when the words are invoked in light of the collateral facts. *See Whitley Whiz, Inc. v. Whitley County*, 812 S.W.2d 149, 150-51 (Ky. 1991); *Black's Law Dictionary* 710-11 (8th ed. 2004).

The E-911 statutes are unambiguous on their face, as discussed *supra*. KRS 65.7621 provides statutory definitions for all relevant terms used in KRS 65.7629(3) and KRS 65.7635. *Cf. GTE, Inc. v. Revenue Cabinet*, 889 S.W.2d 788, 793 (Ky. 1994) (finding that a lack of a statutory definition for a term created an ambiguity). Thus, reasonable minds cannot differ as to its plain terms.

Likewise, the CMRS Board's attempt to expand the scope of the CMRS service charge to include not only postpaid wireless service, but also prepaid wireless service requires textual contortions unsupported by the statutory text of KRS 65.7621(10), KRS 65.7629(3) and KRS 65.7635. The CMRS Board's strained reading would "breath into the statute that which the Legislature has not put there." *Gateway Const.*, 356 S.W.2d at 249. This the CMRS Board cannot do. For the reasons set forth above, the unambiguous statutes authorizing the CMRS service charge simply do not encompass prepaid wireless service.

Assuming *arguendo* that the involved E-911 Statutes are ambiguous, Kentucky law is clear that ambiguous statutes imposing liabilities are liberally construed in favor of the potential obligee and strictly construed against the governmental entity seeking to impose the liability. *See Courtney v. Island Creek Coal Co.*, 474 F.2d 468, 472 (6th Cir. 1973) ("[A]ny doubt concerning the existence of a particular power [of an administrative agency] should be resolved

against such agency."); *Henry v. Parrish*, 307 Ky. 559, 211 S.W.2d 418, 422 (Ky. 1948) ("If there is any fair or reasonable doubt concerning the existence of the particular power here sought to be invoked [to impose a permit fee], it should be resolved against the Board."); *Kentucky Utils. Co. v. Carlisle Ice Co.*, 279 Ky. 585, 131 S.W.2d 499, 504 (Ky. 1939) ("No statute...prescribing severe rules for the conduct of the citizen, is ever extended by implication."). As is evident from the preceding case law, no ambiguous statute imposing liabilities is extended by implication.

One more specific category of the rule requiring the strict construction of ambiguous statutes imposing liabilities is the requirement of the strict construction of ambiguous revenue laws that impose a liability for a fee (or a tax) on citizens. *See Henry v. Parrish*, 211 S.W.2d at 422; *George v. Scent*, 346 S.W.2d at 789 (strictly construing an ambiguous statute imposing a tax); *Brown-Forman Distillers Corp. v. Dep't of Revenue*, 346 S.W.2d 752, 753 (Ky. 1961); *Martin v. F.H. Bee Shows*, 271 Ky. 822, 113 S.W.2d 448, 451 (Ky. 1938). As explained in *George v. Scent, supra*:

> Taxing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed. If the Legislature fails so to express its intention and meaning, it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers. This is particularly so in the matter of pointing out the subjects to be taxed.

Id. at 789 (citations removed).

Under this canon of construction, the scope of the CMRS service charge must be strictly construed to encompass only that which the relevant E-911 Statutes clearly impose it on – postpaid wireless service. Thus, it cannot be construed to apply to prepaid wireless service.

Extending the CMRS service charge to prepaid wireless service can only be accomplished by extending the scope of KRS 65.7621(10), KRS 65.7629(3) and KRS 65.7635 by reading these statutes to imply that a non-billing CMRS provider such as Tracfone must levy

and collect a $0.70 per month CMRS service charge when there is no monthly bill. This would violate the venerable rule that, "[T]he act must be considered as presented by the Legislature without the interpolation of words which it may appear to some were intended to be but were not employed by the lawmaking body in the enactment of the statutes...." Commonwealth v. Lipginski, 212 Ky. 366, 279 S.W. 339, 341 (Ky. 1926)); *see* Hatchett v. City of Glasgow, 340 S.W. 2d 248, 251 (Ky. 1960). As such, the involved E-911 Statutes can only be construed to encompass postpaid wireless service, but not prepaid wireless service.

Dated: April 12, 2010

Respectfully submitted,

/s/ John K. Bush
John K. Bush
Mark A. Loyd
Greenebaum Doll & McDonald PLLC
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202-3197
(502) 589-4200

Attorneys for Amicus Curiae
CTIA – The Wireless Association®

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December 23, 2008

Ms. Cleo Anderson
Mr. Lee Baerlocher
Montana Department of Revenue
PO Box 5805
Helena, MT 59604-5805

Re: *Draft Rules for Emergency Telephone Services*

Dear Ms. Anderson & Mr. Baerlocher:

Verizon Wireless appreciates the opportunity to provide comments to the proposed Draft Rules for Emergency Telephone Services addressing application of E911 fees to prepaid wireless subscribers.

Before providing comments on the rule itself, Verizon would like to indicate that it has a serious concern regarding whether there is sufficient authority for the Department to initiate the proposed rulemaking. The current statute imposing the monthly E911 fee on wireless telephone service subscribers has not been amended to specifically include prepaid wireless service subscribers in the E911 base. Given the nature of the way prepaid wireless services are sold and provided, and the statutes clear direction that the fee is meant to be collected directly from the end consumer, one would question the applicability of MCA 10-4-201 to prepaid wireless subscribers. In fact, during the 2007 legislative session HB 33 was advanced seeking to address this very issue by clearly including prepaid wireless customers in the E911 base. However, HB 33 failed to pass. If the statute does not apply, then Verizon questions under what authority the Department is lawfully engaging in the proposed rulemaking.

However, even with the objection stated above, Verizon still felt the need to specifically address the draft proposed rules as none of the options outlined in the rule adequately provide a mechanism for prepaid wireless providers to collect the E911 fee directly from all prepaid wireless subscribers in accordance with the statute. MCA 10-4-201 makes it clear that the subscriber of wireless services is the one liable for payment of the E911 fee.

Unlike the traditional wireless customers who are billed for their service on a monthly basis, most prepaid wireless services are sold "over-the-counter" by third-party retailers such as Wal-Mart, Target, Radio Shack, and other large and small retailers. These retailers are not "wireless providers" and have no ongoing billing relationship with the wireless customer. Since wireless prepaid customers have no bills, no regular interval for paying for service, and no relationship with the retailer from whom they purchased their service, the traditional method of billing the fee on a monthly basis does not work.

Proposed new rule number 3 identifies two methods a carrier can elect to "collect" and remit the fee from prepaid wireless subscribers. The first method identified is what is commonly referred to as the decrement or "sufficient positive balance" method. While this method may appear to be a simple approach on the surface, significant public policy and compliance problems result from the use of this method so much so that it is clearly not the right answer to collecting E911 fees equitably from all prepaid wireless users.

The decrement method does not resolve the policy concerns of developing a method that will ensure equitable funding of 911 systems from all prepaid wireless consumers since it is only imposed upon those customers that have a sufficient balance in their account at the end of the month. As knowledge of this process spreads it provides prepaid customers with an attractive means to avoid imposition of the fee altogether by simply timing the use of their services so that the account is depleted at the end of each month. The decrement process by its nature provides prepaid customers with an easy way to avoid application of the fee.

Additionally, MCA 10-4-201 requires the fee to be collected from the subscriber. Since prepaid services can be sold anywhere, disclosing the state specific fee that will be collected at the end of each month (provided the customer has a positive balance) can not be done when the service is sold. Since no additional billing or communication takes place with the prepaid subscriber allowing the provider the opportunity to clearly disclose to the subscriber the "collection" of the fee and for what governmental program it is funding has been raised as a concern with some state Attorney General's offices across the country regarding violating fair trade practices.

Because of these deficiencies, this is not a method supported by the wireless industry as an equitable solution to collecting E911 fees from all prepaid wireless subscribers.

The second method provided for in the proposed rule is what is commonly known as the "ARPU" (average revenue per user) method. This method is a calculation method and provides no solution to how a provider is supposed to collect the fee from the subscriber as required in MCA 10-4-201. The method is used to calculate an estimate of the number of prepaid wireless subscribers and then requires the carrier to pay the fee directly, violating the clear intent of the statute. While one might question why a carrier can't just embed the fee in the cost of its service, again since these services are sold on a national basis, carriers can not build an estimate cost for each states and or local jurisdictions 911 fee into its service pricing without risking exposure to class action lawsuits for charging customers a fee for a jurisdiction within which they do not reside. Again, this method does not provide an equitable solution to "collection" of E911 fees from all prepaid wireless subscribers.

The long term solution to collecting E911 fees on prepaid wireless consumers is to collect the fee directly from the customer when the service is sold and the fee can be clearly communicated to the consumer. The wireless industry has been working nationally with the general retail community, as well as public safety, to devise a retail point of sale (POS) solution that will work for all parties involved and ensure equitable contributions

for E911 funding are made by all prepaid wireless consumers. The industry is currently working on draft legislation to implement the retail POS solution in Montana and will forward the bill draft to the Department as soon as it has been finalized within the next few weeks. Implementing any solution other than the retail POS solution would put the state at risk for being in violation of the statutory provisions set forth in MCA 10-4-201. It is our hope that the department will work with the industry on pursuing the POS solution during the 2009 legislative session.

Thank you for the opportunity to provide these comments. If you have any questions or if I can be of further assistance, please contact me at (303) 694-8913

Sincerely,

Stacey L. Sprinkle
VP – State Tax Policy, MidWest Area
Verizon

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Alabama Commercial Mobile Radio Service Emergency Telephone Services Board Petition To Reject Tracfone Wireless Inc.'s ETC Self-Certification	)	

COMMENTS OF THE
CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA")[1] respectfully submits these comments in response to the Commission's Public Notice regarding Tracfone's self-certification of compliance with applicable 911 and E-911 obligations.[2] CTIA is fully committed to helping ensure that customers have access to E-911 services on their wireless phones and to improving E-911 service to all Americans regardless of the technologies and services used. CTIA also is committed to providing qualified individuals with access to wireless communications through the Commission's Lifeline program.[3] Through these comments, CTIA explains why the

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[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

[2] *See Comment Sought on Alabama Commercial Radio Service Emergency Telephone Board Petition to Reject Tracfone Wireless Inc.'s ETC Self-Certification*, Public Notice, CC Docket No. 96-45, DA 09-1558 (rel. July 21, 2009).

[3] The Lifeline program provides qualified consumers with a discount on monthly charges for their primary phone service, even if the primary phone is a wireless phone. *See* http://www.lifeline.gov/lifeline_Consumers.html.

traditional monthly billing collection of 911 and E-911 taxes and fees ("E-911 fees") is ill-suited for prepaid wireless services, and provides an update on industry-wide efforts to develop a uniform solution for collecting and remitting E-911 fees from prepaid wireless customers to support effective state emergency communications systems. While the mechanism used to collect E-911 fees from prepaid wireless customers is an important issue, wireless customers who qualify for Lifeline assistance should not be held hostage while the billing and collection of E-911 fees for prepaid service is being resolved.

INTRODUCTION

Historically, most states and localities have established E-911 fees that are assessed monthly and collected directly from consumers of communication services. For traditional postpaid wireline and wireless services, the collection of these fees from the consumer has been done through the standard monthly billing process utilized by wireless carriers to charge consumers for their services. As the wireless industry has introduced new services, such as prepaid wireless service, many states and localities have sought to expand their E-911 fees to include the users of these services. As explained in this filing, the traditional monthly billing collection method is ill-suited for wireless prepaid services because, with few exceptions, there is no monthly billing statement or 30 day billing cycle that takes place in the prepaid environment.

DISCUSSION

A. Traditional Monthly Billing Collection of E-911 Fees is Ill-Suited for Prepaid Wireless Services.

The difficulty in collecting taxes and fees from wireless prepaid consumers has been magnified by the fact that many state laws specifying E-911 fee collection methods were adopted prior to the existence or widespread adoption of prepaid services and, thus, were written and codified into statute with traditional postpaid services in mind. Of the 50 states and the District

of Columbia, 49 jurisdictions impose an E- 911 fee on postpaid wireless services.[4] Forty-seven of those 49 jurisdictions impose the fee directly on the consumer.[5] Most of these state statutes require that the E-911 fee shall be clearly disclosed and collected as a separate charge from the end user – a requirement that is difficult for wireless prepaid service providers to comply with given the way prepaid services are purchased and provided.

Wireless providers have worked with states and the public safety community for several years seeking a solution that is better tailored to the collection of E-911 fees imposed upon prepaid consumers. Early efforts focused primarily on ways to adapt the traditional postpaid monthly billing process to the prepaid wireless business model. None of the resulting mixed bag of methodologies, however, adequately addressed E-911 funding. For example, none of these methods effectively solve the problem of how to collect the E-911 fees from all prepaid consumers. Instead, those measures focused on proxy methodologies to calculate the fees to be remitted for prepaid services, irrespective of whether the fee can ultimately be collected from the end-user as stated in the statute or as accomplished in the postpaid environment. Thus, none of these methods adequately address collection of E-911 fees from all prepaid consumers and, as a result, trying to comply with these methods has been confusing, burdensome and inconsistent.

The concept of assessing a monthly fee does not work in the prepaid wireless environment for a host of reasons. As noted previously, there is no monthly billing mechanism for charging the E-911 fee directly to prepaid wireless customers. The only way the carrier could try to "bill" the fee to the prepaid wireless users would be to "embed" the cost of the fee into the price of the service. However, prepaid wireless services are offered nationally and sold

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[4] Currently, about half the states do not impose E-911 fees on prepaid service at all.

[5] Arizona and the District of Columbia impose the fee on the provider but allow the fee to be recovered from the end-user

throughout the country by mass retail outlets. The wireless provider has no way of knowing in which state the retailer will ultimately sell the prepaid cards and/or phones, and since wireless is a mobile service, no way of knowing in advance where the service will be used. Furthermore, the provider has no way of knowing whether the customer will use their minutes in a week or in three months. Thus, there is no way for the carrier to know how many "monthly" fees should be embedded into the cost of service. Since so many assumptions that may or may not be relevant to any individual user go into this calculation, this method does not allow for the collection of the E-911 fee to be clearly disclosed to the consumer, and in addition, embedding the fee into the cost of air time also subjects the E-911 fee to the general sales tax – improperly burdening prepaid consumers with double taxation. This is troubling as most state statutes specifically have precluded the state's sales taxes from applying to E-911 fees.

Of the states that have indicated their E-911 fee applies to prepaid services, fifteen states[6] provide for optional methodologies that require prepaid wireless service providers to either: remit the E-911 fees on behalf of their prepaid wireless customers using an estimated monthly Average Revenue Per User ("ARPU") to determine the approximate number of prepaid subscribers ("Tennessee method"); collect the E-911 fee directly from the customers at the point of sale without specifying how to work with the retailers to implement this method; or "decrement" (deduct) comparable minutes from the prepaid wireless customer's account each month, but only if they have a sufficient positive balance in their account to cover the fee when it is due. Both the ARPU and decrement methods presume that a carrier has built the fee into its cost of service, which as noted above, is impossible to accomplish and unfair to prepaid wireless

[6] Alabama, Arkansas, Connecticut, Georgia, Iowa, Kentucky, Maine, Nebraska, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee and Virginia.

customers. In the remaining states, the law is unclear and some prepaid providers are in litigation over whether the fee applies to prepaid wireless services.

The end result of the current confusing mix of state laws is an administratively burdensome system, an inability to directly collect E-911 fees from all prepaid wireless consumers, a lack of transparency to consumers regarding the collection of the E-911 fees, and, in some cases, expensive litigation over application of the E-911 fees to prepaid services. In response to these problems, wireless providers have focused their efforts on developing a uniform solution to collect E-911 fees at the point of sale.

B. Developing a Uniform Approach to Ensure that Fees are Equitable, Sufficient, and Clearly Disclosed to Consumers.

To address this challenge, the wireless industry has been working to develop a uniform approach that would replace the inefficient and ineffective traditional methods of assessing E-911 fees on wireless prepaid services with a solution that delivers more certainty and efficiency in the funds going to public safety by collecting the fee directly from all prepaid consumers when the service is sold. This "point of sale" approach ensures that collection of E-911 fees is transparent and clearly disclosed to the consumer, and is easily administered by all sellers of wireless prepaid services.

Since approximately 80% of wireless prepaid services are sold through traditional retail outlets such as Wal-Mart, Best Buy and Target, CTIA and its members have been working with the retail community to develop a point of sale solution that would impose minimal compliance burdens on them was essential. In 2008, the wireless industry reached out to a number of retailers to discuss the feasibility of developing a process for collection of the E-911 fees at the point of sale, seeking to leverage the existing sales tax structure as much as possible. Numerous

discussions were held with retailers and a set of concepts and principles, as well as model legislation were successfully developed.

As a result of those efforts, in the 2009 legislative session, three states passed legislation to impose E-911 fees on prepaid wireless customers at the point of sale: Louisiana;[7] Maine;[8] and Texas.[9] It is notable that the point of sale approach has enjoyed support from the public safety community. For example, the National Emergency Number Association ("NENA") supported the legislation in Louisiana, Maine, and Texas. Similarly, the Association of Public-Safety Communications Officials ("APCO") supported the bill in Louisiana. In addition, the National Conference of State Legislatures ("NCSL") recently endorsed model legislation to implement the point of sale approach at its 2009 annual meeting.[10] The wireless industry is committed to working with state administrative agencies during the implementation process to ensure that, in cases where the legislature has granted significant administrative discretion to agencies, the agencies agree to administer the fee in a manner consistent with the intent of the model legislation endorsed by NCSL.

CONCLUSION

CTIA and the wireless industry remain committed to working with public safety, retailers and state and local governments to implement collection of E-911 fees for prepaid wireless services at the point of sale. As explained above, this is the optimal approach for collecting

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[7] Louisiana HB 1056 (Act No. 531), adopted July 10, 2009.

[8] Maine LD 1056 (P.L. 400), adopted June 15, 2009.

[9] Texas Health & Safety Code, Sec. 771.0712 - adopted June 19, 2009.

[10] Certain states have modified the model bill to suit their own individual needs. For example, some states have adopted "flat" fees, while others have adopted "percentage" fees. CTIA believes that, as all stakeholders continue to work together, states should gravitate toward a single methodology for imposing E-911 fees on prepaid wireless consumers.

critical E-911 fees directly from the end-user, and this method will help ensure that all wireless users are contributing equitably and transparently to the funding requirements necessary to support the emergency communications systems. While the mechanism used to collect E 911 fees from prepaid wireless customers is an important issue, wireless customers who qualify for Lifeline assistance should not be held hostage while the issue is being resolved in state courts and legislatures.

Respectfully submitted,

/s/ Christopher Guttman-McCabe

CTIA – THE WIRELESS ASSOCIATION®

1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Christopher Guttman-McCabe
Vice-President, Regulatory Affairs

Michael Altschul
Senior Vice President & General Counsel

Scott K. Bergmann
Assistant Vice-President, Regulatory Affairs

Its Attorneys

Dated: August 20, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Federal-State Joint Board on Universal Service	WC Docket No. 09-197
Colorado E-911 Authorities Petition to Reject TracFone Wireless Inc.'s Self-Certification of 911 and E-911 Compliance	

REPLY COMMENTS OF THE CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA")[1] respectfully submits these reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice regarding the Petition filed by the Colorado 911 Authorities to reject TracFone's self-certification to the FCC of compliance with applicable 911 and E-911 obligations.[2] As described below, the Commission should dismiss the Petition because (1) the Colorado 911 Authorities misunderstand the requirements of eligible telecommunications carriers ("ETCs") participating in the Federal Universal Service Low-Income programs, (2) TracFone is not required to make any such certification for Colorado, and (3) the Colorado 911 Authorities have chosen an improper venue for their request.

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[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

[2] *See Comment Sought on Colorado E-911 Authorities Petition to Reject TracFone Wireless Inc.'s Self-Certification of 911 and E-911 Compliance,* Public Notice, WC Docket No. 09-197, DA 10-346 (rel. March 1, 2010) (The Colorado E911 Authorities incorrectly conflate the FCC's condition on forbearance from the facilities-based carrier requirement of participation in the Lifeline program with the FCC's condition on TracFone's grant of ETC designation. CTIA will address both requirements in these reply comments as the Petition's request suffers from the same infirmities for each.).

TracFone is Not Required to Obtain Certification From Colorado PSAPs or to Certify Compliance With Colorado E911 Laws

The Colorado 911 Authorities base their Petition on the Commission's ability to reject TracFone's self-certification that it has complied with state 911/E911 laws as a condition of ETC designation. Specifically, the Colorado 911 Authorities' Petition asks the FCC to examine TracFone's compliance with two of the conditions of its certification as an ETC – the PSAP Certification requirement that was a condition of FCC forbearance from the requirement that Lifeline participants provide service over their own facilities, and the State 911/E911 Law Compliance Certification that is a condition of the FCC's grant of TracFone's ETC designation. Because TracFone is not an ETC in Colorado and because the FCC does not certify ETCs for the state of Colorado, the Colorado 911 Authorities request is misplaced.

TracFone participates in the Federal Lifeline program, which is part of the Universal Service Fund's Low-Income fund.[3] In order to obtain certification as an ETC – a prerequisite to participation in the Universal Service Fund mechanisms – TracFone successfully petitioned the FCC for forbearance from the requirement that ETCs use their own facilities to provide the supported services.[4] As a condition of that forbearance, TracFone must obtain certification of E911 service compliance from each PSAP in the coverage area for which they are receiving support[5] – or in the alternative, self-certify compliance with E911 coverage requirements.[6] Additionally, for those states for which the FCC designates ETCs, the Commission imposed a requirement on TracFone that it certify compliance with state 911 and E911 laws.[7]

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[3] *See generally*, Universal Service Program for Low-Income Customers *at* http://www.fcc.gov/wcb/tapd/universal_service/lowincome.html.

[4] *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)Cl)(A) and 47 C.F.R. § 54.20l(i)*, 20 FCC Rcd 15095 (2005) ("TracFone Forbearance Order").

[5] TracFone Forbearance Order at ¶15.

[6] *See Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. et al,* 24 FCC Rcd 3375 (2009).

[7] *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al,* 23 FCC Rcd 6206 (2008) ("TracFone ETC Designation

The Colorado 911 Authorities, however, are asking the Commission to reject a certification that TracFone is not required to make. The FCC's designation of TracFone – and thus, the FCC's requirement for state 911 law compliance certification – was specific to the 11 states for which TracFone petitioned and for which the Commission is the entity that certifies ETC status.[8] Colorado does not fit into either of those categories. TracFone's Petition for ETC designation at the FCC did not include a request for designation in Colorado, as the Colorado Public Utilities Commission ("Colorado PUC") designates ETCs in Colorado.[9] As a result, the Colorado 911 Authorities are seeking a result the FCC is not in a position to grant and is more properly resolved through Colorado agencies. The Colorado 911 Authorities Petition should be dismissed.

Even if the FCC Were the Proper Venue, the State Tax Law in Question Does Not Address Prepaid Wireless Services

Finally, even if the FCC were the proper venue for the Colorado 911 Authorities to seek action in this matter, the state tax law in question does not address prepaid wireless. The operative statutes in Colorado governing the collection and remittance of E911 fees make no mention of prepaid wireless services. In fact, legislation was proposed in 2008 specifically seeking to expand the E911 statutes to include prepaid wireless consumers in the fee base. Those provisions, however, were removed from the bill prior to final passage.[10]

Order") ("we condition TracFone's *designation* as an ETC eligible for Lifeline support in each state on TracFone's certification that it is in full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, and support, of 911 and E911 service." (emphasis added)).

[8] TracFone has been designated by the Commission as an ETC in New York, Virginia, Connecticut, Massachusetts, North Carolina, Alabama, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia. TracFone Designation Order at ¶ 26.

[9] *See* 4 CCR 732-2 § 2187 *et seq.*

[10] Introduced bill - http://www.leg.state.co.us/clics/clics2008a/csl.nsf/fsbillcont3/6B0AA59282A2E4B7872573940062B1A0?open&file=1249_01.pdf
Enrolled measure – http://www.leg.state.co.us/clics/clics2008a/csl.nsf/fsbillcont3/6B0AA59282A2E4B7872573940062B1A0?open&file=1249_enr.pdf

In many states, the wireless industry is working directly with the public safety community to pass legislation to address prepaid customer participation in the E911 base through a retail point-of-sale collection mechanism.[11] In fact, CTIA has worked in Colorado with the Colorado 911 Authorities involved with this Petition during the 2010 legislative session.[12] The industry has similar legislation pending in approximately 16 states and CTIA believes this is the best approach that allows for collection of critical E911 fees directly from the end-user or prepaid wireless services, while ensuring that all wireless users are contributing equitably and transparently to the funding requirements necessary to support the emergency communications systems.

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[11] *See, e.g., Comment Sought on Alabama Commercial Radio Service Emergency Telephone Board Petition to Reject TracFone Wireless Inc.'s ETC Self-Certification,* Public Notice, CC Docket No. 96-45, DA 09-1558 (rel. July 21, 2009).

[12] http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/C2D1A9E5BF83061E872576AC00670983?open&file=120_ren.pdf

CONCLUSION

CTIA remains committed to working with public safety, retailers and state and local governments to implement collection of E-911 fees for prepaid wireless services at the retail point-of-sale. However, because the instant Petition seeks action that is outside the scope of the Commission's ETC authority, the Petition should be dismissed.

Respectfully submitted,

/s/ David J. Redl
David J. Redl
Director, Regulatory Affairs

Michael F. Altschul
Senior Vice President and General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Jackie McCarthy
Director, State Regulatory Affairs

CTIA-THE WIRELESS ASSOCIATION®
1400 16th Street, NW, Suite 600
Washington, DC 20036
(202) 785-0081

April 15, 2010

October 6, 2008

Mr. Ken Lowden
Executive Director
Indiana Wireless Enhanced 911 Advisory Board
10 West Market Street, Suite 2980
Indianapolis, Indiana 46204

Dear Director Lowden:

CTIA – The Wireless Association® respectfully submits the following letter concerning your recent activity as it relates to assessment and collection of E911 fees on prepaid wireless services.[1] Today, there is growing pressure to ensure consumers of prepaid wireless services and other emerging communications services are contributing their fair share to the various state and local E911 funds. This was especially true during a very active 2007-08 legislative session where states sought to broaden their current E911 base to specifically include prepaid wireless. It is our hope that if legislative discussions of E911 fee collection and disbursement reform progress, Indiana will consider the difficulties of collecting E911 fees from prepaid consumers and work with the industry to develop and implement a solution to this problem.

Currently, as many as 22 states include prepaid wireless in their E911 base, while compliance, litigation, and enforcement issues continue to mount. Most state statutes were written to address how 911 fees should be collected and remitted in a postpaid environment, an environment where bills are sent to wireless consumers each month and the E911 fee can simply be added to the bill. Given the nature of the way prepaid wireless services are sold and provided, simply expanding the base to include prepaid wireless services without addressing a means to be able to collect the fees directly from consumers only adds to the existing confusion and litigation challenging the applicability of these fees to prepaid services. The Industry recognizes that there is a problem with many of the existing state statutes addressing this issue and is working to develop a solution that will provide for a means to collect the fees directly from end users. This will help ensure that prepaid wireless consumers are contributing equitably to the funding needs required to maintain and operate the emergency communications systems across the country, as well as allowing prepaid consumers to clearly identify what their E911 funding contributions are when they buy their service.

Agreeing on an approach for the collection of fees from the end-users of prepaid services has been a challenge but one in which we continue to engage and make progress. Unlike the postpaid billing model, a monthly financial arrangement usually does not exist between the customer and the provider of prepaid wireless services. The services are paid for in advance, rendering the traditional monthly billing collection process inapplicable because, with few exceptions, there is no monthly billing that takes place in the prepaid environment.

[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Services, PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

To further complicate collection of the fees from the end user, most of the sales of prepaid services are not directly through the wireless provider but instead are sold through independent third party retailers. Any equitable solution will likely involve the general retail community, not just wireless providers.

Today's legislative solutions, although well-intentioned, have not been able to effectively solve the problem of how to actually collect the E911 taxes and fees from prepaid consumers and instead have focused on specifying a methodology to calculate the amount of fees to be remitted for prepaid services. We believe the goal should be to create a universal E911 collection methodology that would be competitively neutral, uniform, easily administered and transparent to customers. CTIA respectfully requests that should legislative reforms progress, the E911 Advisory Board work with the industry to devise a solution that will benefit all the parties involved in providing these critical services.

Sincerely,

K. Dane Snowden
Vice President,
External & State Affairs

cc: Mr. Brad Meixell
Mr. Harold Williams
Ms. Lori Forrer
Mr. Larry Jones
Mr. Mike Schulte
Mr. Jerry Branock

March 13, 2009

Mr. Neal Osten
Federal Affairs Counsel
National Conference of State Legislatures
444 North Capitol Street, NW, Suite 515
Washington, D.C. 20001

RE: E911 Prepaid Fee Collection

Dear Neal:

The recent NCSL taskforce meeting held in Tucson continued to highlight NCSL's leadership in addressing 911 taxes and fees in general and specifically the difficult issue of collecting public safety fees from prepaid wireless consumers. On behalf of the entire wireless industry, CTIA sincerely appreciates your continued commitment to work towards a solution to collect 911 taxes and fees from prepaid consumers as this issue presents many unique challenges not present in the postpaid collection model.

In the postpaid environment, wireless providers successfully collect over $2 billion annually from end-users and distribute that money back to the states and localities to support operations of the emergency communication systems. Because prepaid services require no ongoing relationship between the customer and the provider, the point-of-sale (initial sale or replenishment) transaction is the only financial exchange that takes place with the customer and the only point at which collection of a 911 fee can be clearly disclosed to prepaid consumers.

Recognizing the need to address the current problem with collecting prepaid 911 fees, the industry reached out to both public safety and the non-carrier retailers in early 2008 to solicit their input in crafting a nationwide solution. Throughout this process, our goal has been to develop a solution that fully and most efficiently provides a vehicle for Public Safety to receive all monies needed to help in the delivery of the Nation's critical emergency response system. The intent of our outreach was to work with major stakeholders towards an approach that would ensure a more equitable, efficient and uniform collection mechanism from prepaid wireless consumers. Although communications customers bear the brunt of paying for the ability to dial 911, the benefits of accessing public safety are realized by all citizens including retail merchants.

Statistics show that approximately 80% of the purchases of prepaid services occur at retail stores across the country. The amount of revenue being generated from prepaid services for both the wireless industry and the retail industry lends itself to a natural partnership to work together to address this issue to the mutual benefit of public safety. The wireless industry is keenly aware and sensitive to retailers' concerns and we stand ready to work through this issue.

The Point-of-Sale proposal, which was reached after months of discussions with numerous national retailers, attempts to complement the existing sales tax structure as much as possible to reduce the administrative burden to retailers. Additionally, this proposal

includes many of the concepts and principles that have been adopted by the states that are part of the ongoing Streamlined Sales and Use Tax Project (SSTP), a cooperative effort of the states to simplify sales tax administration. Contrary to some of the claims that were made by those who oppose this effort, this proposal would not require retailers to file directly with public safety. The retailers would remit the 911 fees collected from prepaid consumers with their normal sales tax filings, again trying to minimize any additional burden to retailers.

In discussions with retailers, they questioned why a solution was needed as they felt there were other options the carriers could implement that would leave them out of the mix. One of the options the retailers were advocating were that the 911 tax or fee should be embedded into the price of prepaid wireless service. In addition to the inherent complexities with trying to accomplish this for a product that is sold in all 50 states with different 911 fee rates, this approach could add far more burdens for the retail community as well. For example, most state statutes exempt 911 fees from the sales and use tax, so retailers could be required to design a system to remove the embedded amount of the 911 fee from the purchase price prior to imposing the general sales taxes.

Another method currently authorized in many states that tax prepaid consumers is the decrement method. While this method does allow for a recovery of the obligation from the consumer, it does not ensure that the fee is collected from all prepaid consumers and it does not provide for a means to clearly disclose the fee to consumers. Since the decrement method is only imposed upon those customers that have a sufficient balance in their account at the end of the month, it does not resolve the important public policy objectives of developing a method that will ensure equitable funding of 911 systems from all prepaid wireless consumers.

At the NCSL task force meeting, some legislators suggested that states consider legislation to require retailers to collect 911 fees at the point of sale as a requirement for the privilege of selling prepaid wireless calling service. It is our preference that, before resorting to changes in the law that would significantly disrupt the current marketplace, the NCSL and its leadership sit down with public safety, retailers, and the wireless industry to try to reach a consensus on a point of sale solution that would minimize retailer burdens while supporting the critical needs of public safety. We stand ready to have that discussion.

We thank NCSL for its long standing leadership and for working with the industry and other stakeholders on addressing the collection of public safety taxes and fees. We look forward to working with you on this and many other issues in 2009.

Sincerely,

K. Dane Snowden
Vice President
External & State Affairs

1400 16th Street, NW Suite 600 Washington, DC 20036 Main 202.785.0081 Fax 202.785.0721 www.ctia.org

U.S. Congress Calls for Equitable E911 Fee Collection Methods for Prepaid Wireless Services

"The Committee strongly encourages States and localities to equitably apply 911 fees among communications providers, to the extent possible. In particular, the Committee urges States and localities to study fee structures that accommodate pre-paid telecommunications services."

- U.S. Senate Committee on Commerce, Science & Transportation, Report on S. 428, Report No.110-142, Page 9, August 3, 2007

"The Committee also encourages States and their political subdivisions to apply 911 fees equitably to providers of different types of communications services to the extent possible. In particular, the Committee urges States and their political subdivisions, when adopting 911 and E-911 fees, to examine fee structures that accommodate pre-paid telecommunications services."

- U.S. House Committee on Energy & Commerce, Report on H.R. 3403, Report No.110-442, Page 10, November 13, 2007

" PLEASE JOIN US TO PROTECT 911 AND PUBLIC SAFETY "

SUPPORT SB 48 - POINT OF SALE

Prepaid cell phones are now close to 20% of the wireless market, yet there is no equitable way under present law to collect from prepaid wireless users the fee that is paid by regular landline, VoIP, and wireless consumers, which is essential to fund the 911 systems serving your county.

Kansas 911 centers rely upon wireless and wireline telecommunications users to fund 911 operations. But due to inefficiencies in current collection methods and legal questions around how prepaid carriers may collect and remit the 911 fees, the method is ineffective. **Kansas 911 centers could collect $1.4 Million per year through point of sale.**

The purchase of prepaid wireless service includes both the purchase of a phone and/or the purchase of minutes (typically in the form of a card) to "recharge" the phone with minutes of airtime. In these instances a billing relationship does not exist and prepaid service is a cash & carry service.

How does SB 48 solve the problem?
SB 48 clarifies that a 1.1% fee on the sale of prepaid wireless services will be collected at the point-of-sale by the retailer and remitted to the Kansas Department of Revenue in a manner similar to the present sales tax collection system. The fee will be transferred by KDOR to the LPCA for distribution to your counties and 911 centers through the process currently used with other telecommunications services. SB 48 provides an allowance to KDOR to offset the costs of compliance.

Are there other alternatives?
No. Other than the point-of-sale method proposed in SB 48, there is no effective and equitable method for collecting the surcharge from prepaid wireless customers. There is no direct relationship between the prepaid wireless provider and the customer when services are purchased through a third party; therefore, the surcharge cannot be collected from a customer by a prepaid wireless provider.

Has the SB 48 approach been used in other states?
NCSL adopted model legislation that closely resembles SB 48, and Maine, Louisiana, Texas, Wisconsin, Virginia, and Indiana have passed legislation that implements a point of sale process. The systems that nationwide retailers and carriers are building to comply with the laws in those states will make compliance easier for Kansas's retailers.

The Bottom Line
The current collection system for 911 fees on prepaid wireless services is inefficient and needs to be fixed. The 911 emergency system is a service for every telecommunications user, so every user should help fund the 911 system.

Eighty percent (**80%**) of all prepaid wireless service is **sold through 3rd party retailers**, and in those cases the prepaid wireless carrier has no role in the transaction with the customer. Therefore, the only effective and equitable solution to assessing 911 fees on prepaid wireless services is when the transaction takes place, which is when the service is sold.

SB 48 accomplishes this goal.

Please vote YES on SB 48